

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555(JMP)

Case No. 08-01420(JMP)(SIPA)

Adv. Case No. 09-01258

Adv. Case No. 08-01743

Adv. Case No. 09-01242

- - - - -x

In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al.,

Debtors.

- - - - -x

In the Matter of:

LEHMAN BROTHERS INC.,

Debtor.

- - - - -x

NEUBERGER BERMAN, LLC,

Plaintiff,

-against-

PNC BANK, NATIONAL ASSOCIATION,

LEHMAN BROTHERS INC., AND LEHMAN

BROTHERS COMMERCIAL CORPORATION,

Defendants.

- - - - -x

VERITEXT REPORTING COMPANY

212-267-6868

516-608-2400

1       - - - - -x

2       STATE STREET BANK AND TRUST COMPANY,

3                               Plaintiff,

4       LEHMAN COMMERCIAL PAPER INC.,

5                       -against-

6                               Defendant.

7       - - - - -x

8       LEHMAN BROTHERS SPECIAL FINANCING INC.,

9                               Plaintiff,

10      BNY CORPORATE TRUSTEE SERVICES, LTD.,

11                       -against-

12                               Defendant.

13      - - - - -x

14

15                       U.S. Bankruptcy Court

16                       One Bowling Green

17                       New York, New York

18

19                       September 15, 2009

20                       10:03 a.m.

21

22       B E F O R E:

23       HON. JAMES M. PECK

24       U.S. BANKRUPTCY JUDGE

25

1  
2 RE: CASE NOS. 08-13555(JMP) and 08-01420(JMP)(SIPA)

3 HEARING re Interim Applications for Allowance of Compensation  
4 for Professional Services Rendered and for Reimbursement of  
5 Actual and Necessary Expenses [Docket No. 4839]  
6

7 HEARING re Motion of Wells Fargo, NA for Relief from the  
8 Automatic Stay [Docket No. 4640]  
9

10 HEARING re Motion of Wells Fargo, NA for Relief from the  
11 Automatic Stay [Docket No. 4671]  
12

13 HEARING re Motion of Washington Mutual Bank f/k/a Washington  
14 Mutual Bank, FA. For Relief from the Automatic Stay [Docket No.  
15 4759]  
16

17 HEARING re Motion of A/P Hotel, LLC for Relief from the  
18 Automatic Stay [Docket No. 4950]  
19

20 HEARING re Motion for Authorization to Assume an Interest Rate  
21 Swap with MEG Energy Corp. [Docket No. 5012]  
22  
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2 HEARING re Debtors' Motion for Establishment of Procedures for  
3 the Debtors to Transfer Their Interests in Respect of  
4 Residential and Commercial Loans Subject to Foreclosure to  
5 Wholly-Owned Non-Debtor Subsidiaries [Docket No. 4966]

6  
7 HEARING re Debtors' Motion for Establishment of Procedures for  
8 the Debtors to Compromise Claims of the Debtors in Respect of  
9 Real Estate Loans [Docket No. 4942]

10  
11 HEARING re Motion of Landwirtschaftliche Rentenbank for 2004  
12 Examination [Docket No. 4800]

13  
14 HEARING re Debtors' Motion for Authorization to Implement  
15 Alternative Dispute Resolution Procedures for Affirmative  
16 Claims of Debtors Under Derivative Contracts [Docket No. 4453]

17  
18 HEARING re Debtors' Motion to Compel Performance of Metavante  
19 Corporation's Obligations Under an Executory Contract and to  
20 Enforce the Automatic Stay [Docket No. 3691]

21  
22 HEARING re Motion of DnB Nor Bank ASA for Allowance and Payment  
23 of Administrative Expense Claim and Allowing Setoff of Such  
24 Claim [Docket No. 4054]

1  
2 HEARING re Motion of William Kuntz, III for Review of Dismissal  
3 of Appeal [Docket No. 1261]  
4

5 RE: ADV. CASE NO. 09-01258:

6 PRE-TRIAL CONFERENCE  
7

8 RE: ADV. CASE NO. 08-01743:

9 PRE-TRIAL CONFERENCE  
10

11 RE: ADV. CASE NO. 09-01242:

12 Motion of BNY Corporate Trustee Services Limited to Stay  
13 Further Proceedings Pending Disposition of its Motion for Leave  
14 to Appeal the August 12, 2009 Order Denying BNY's Motion to  
15 Dismiss and any Disposition of the Merits of that Appeal  
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24 Transcribed by: Clara Rubin

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## P R O C E E D I N G S

THE COURT: Be seated, please. Good morning.

Mr. Miller.

MR. MILLER: Good morning, Your Honor. Harvey Miller, Weil, Gotshal & Manges, on behalf of the debtors. I have to note, Your Honor, that this morning is a much quieter morning than it was a year ago today on this date. We seem to have survived a year.

THE COURT: We've survived a year, although I'll tell you that a year ago today it was completely quiet here.

MR. MILLER: Not in my life, Your Honor. In any event, we're prepared to go forward, Your Honor, with another omnibus hearing, and the first matter on the calendar, Your Honor, under uncontested matters are the second round of interim applications for allowances of compensation for professional services rendered and for reimbursement of actual and necessary expenses.

In connection with the applications, Your Honor, that have been filed to date and in accordance with the fee protocol, the fee committee has filed two reports on fee applications. The first report pertained to the first interim fee applications, and more recently on September 10, 2009 the fee committee filed its second report concerning the second interim fee applications.

If I may, Your Honor, with respect to the first

1 interim fee applications, the report addresses the first  
2 interim fee applications that were considered by the Court at  
3 an earlier hearing. At the time of the consideration of those  
4 fee applications, the fee committee had made interim  
5 recommended deductions, where pertinent, to certain of their  
6 first interim fee applications.

7 In the fee committee report dated September 10, 2009,  
8 the committee has submitted final recommended deductions as to  
9 those fee applications. The report recommends that such  
10 deductions be applied against the ten percent holdback amount  
11 relating to the first interim fee applications. The report  
12 sets out the first recommended deduction and the final  
13 recommended deductions at pages 2, 3, 4 and 5 of the report.

14 The final recommended reductions applicable to the  
15 first round of interim fee applications totals \$186,660.08.  
16 Assuming that each of the retained professionals agrees to the  
17 final recommended deduction, the fee committee recommends that  
18 after application of those deductions the balance of the ten  
19 percent holdback amount relating to the first interim fee  
20 applications be released to the respective retained  
21 professionals.

22 I do note, Your Honor, that as to one retained  
23 professional, Houlihan Lokey Howard Zukin Capital, Inc., the  
24 final recommended deduction has been deferred. The applicant  
25 and the fee committee will be in further discussions concerning

1 the recommended deduction.

2 As to all of the other retained professionals who  
3 agreed to the final recommended deductions, we request that the  
4 Court allow the payment of the balance of the ten percent  
5 holdback amount to each of the retained professionals.

6 As to the second interim fee applications, Your Honor,  
7 the fee committee report, in the same fashion, used the process  
8 that was applied as to the first set of interim fee  
9 applications. It's -- the report sets forth the process used  
10 by the fee committee and its professionals in reviewing the  
11 second interim fee applications and sets forth that each  
12 retained professional has been sent an individual summary sheet  
13 setting forth in detail the deductions recommended in the fees  
14 and allowances by the committee. This is essentially the same  
15 process that was used in connection with the first interim fee  
16 applications.

17 The second interim fee applications cover the period  
18 from February 1 through May 31, 2009. There are eighteen  
19 applications for allowances of interim compensation and  
20 reimbursement of expenses.

21 The requested fees, Your Honor, total \$115,193,605.42.  
22 The reimbursement of expenses requested totals \$4,036,840.23.

23 I note for the Court's consideration that during the  
24 period covered by the second interim fee applications the  
25 investigation into the affairs of the debtors expanded, caused

1 both by the appointment of an examiner and his professionals,  
2 as well as the expansion of professional services performed on  
3 behalf of the creditors' committee. Those facts account for  
4 the increase in the aggregate total of the requested allowances  
5 of compensation and reimbursement of expenses.

6 Of the eighteen applications filed by retaining  
7 professionals, twelve are for retained professionals that were  
8 engaged by the debtors-in-possession for the applicants or  
9 professionals retained by the unsecured creditors' committee,  
10 and the remaining two applications are professionals retained  
11 by the examiner.

12 The fee committee recommendation as to the second  
13 interim applications: The fee committee has recommended  
14 deductions applicable to the second interim fee applications  
15 totaling \$2,512,685.76, comprised of requested fees and  
16 expenses. The committee also recommends that the twenty  
17 percent holdback amounts in respect of the second interim fee  
18 applications be reduced to ten percent pending the resolution  
19 of the issues that had been set forth by the committee in the  
20 individual summary sheets provided to each of the retained  
21 professionals.

22 Based upon the fee committee report and all of the  
23 proceedings which have taken place, it is requested that the  
24 Court allow the second interim fee applications, consistent  
25 with the fee committee report, and direct the payment of such

1 allowed fees and expenses subject to the ten percent holdback  
2 amounts to cover remaining outstanding issues and further order  
3 of the Court.

4 And again, Your Honor, I note that these are interim  
5 allowances and will be reconsidered at the time of final  
6 applications.

7 So that is the requested relief at this time, Your  
8 Honor.

9 THE COURT: That's understood. I have read the fee  
10 committee report dated September 10 which you have just  
11 summarized, and I find that it's very helpful in not only  
12 summarizing the nature of the committee's review of the  
13 applications filed by the various retained professionals but  
14 also in noting areas of concern with respect to future  
15 applications to be filed.

16 One thing that I did note, and I don't know to what  
17 extent this is a subject for concern or not, is that the amount  
18 recommended for disallowance seems to have grown. I'm not sure  
19 if it has grown as an overall percentage of the fees or if it's  
20 just that because the overall fees are a higher number, that we  
21 ended up with a higher number for proposed disallowance. I  
22 can't tell to what extent that reflects some change in the way  
23 these applications are being presented. And because this is  
24 not broken out on a professional-by-professional basis, I can't  
25 tell whether or not this is an across-the-board problem or a

1 problem that relates to a particular professional.

2 But I do appreciate the fact that this is a process  
3 which, at least as I'm observing it, seems to be working quite  
4 well. And I'll simply ask if there's anyone --

5 MR. MILLER: I would just add, Your Honor --

6 THE COURT: -- who's a member of the committee, who  
7 wishes to be heard on this.

8 MR. MILLER: The recommended deductions: In the  
9 individual summary sheets, Your Honor, the committee sets forth  
10 in great detail what is the issue with respect to a particular  
11 item in a fee application. Thereafter there are -- I wouldn't  
12 call them negotiations -- discussions with the committee  
13 representatives, and either the applicant explains  
14 satisfactorily whatever the comment is or that will be the  
15 final recommended deduction.

16 THE COURT: I understand --

17 MR. MILLER: Okay.

18 THE COURT: -- that's the way it works. The way this  
19 is developed in terms of my own involvement, however, is that  
20 I'm not seeing those individual sheets. It may be that I  
21 should see those sheets so that I have a better understanding  
22 as to where the problems appear to be among the various  
23 professionals. If the committee would prefer not to do that,  
24 I'm not going to make an issue of it. But I do note that, at  
25 least as I'm reviewing this report, I'm only seeing broad

1 numbers except for the review on an application-by-application  
2 basis of the first interim report and how that has been  
3 reconciled. But I'm unable to tell, other than the gross  
4 number, what the committee has come up with to get to the  
5 \$1,975,451.68 recommended disallowance as to fees in the  
6 aggregate.

7 So I'm going to make the suggestion, if the committee  
8 is willing to do this, that I would like to see, for in-camera  
9 review at the time of the next report, copies of the individual  
10 proposed disallowances by applicant. I also think that it  
11 would be useful for me to see the sheet applicable to this  
12 report on a professional-by-professional basis. It doesn't  
13 affect my determination of today's applications. I'm prepared  
14 to approve them consistent with the report, and I'm also  
15 prepared to approve the reduction in the holdback from twenty  
16 percent to ten percent, pending resolution of any ongoing  
17 disputes with affected professionals.

18 MR. MILLER: I would just add, Your Honor, that the  
19 committee has worked very diligently. And I think Mr. Feinberg  
20 said at our last meeting that he actually didn't realize what  
21 he was getting into when he accepted the position.

22 THE COURT: I was confident that was true when he  
23 accepted the position.

24 MR. MILLER: He has now realized it, Your Honor.

25 THE COURT: And I'm glad that he's hard at work.

1 So those applications are all allowed --

2 MR. MILLER: Thank you, Your Honor.

3 THE COURT: -- subject to the comments just made.

4 MR. MILLER: Going on with the calendar, Your Honor,  
5 items 2, 3, 4 and 5, Your Honor, as well as 6, are all subject  
6 to stipulations and agreed orders that will be submitted to the  
7 Court. And I don't believe, Your Honor, we need to go through  
8 that since the parties have agreed, unless Your Honor wants to  
9 go into each one of those items.

10 THE COURT: Well, the one item that I am actually most  
11 interested in hearing some more about, even though we're going  
12 through this in summary fashion, is number 6, which is the  
13 motion for authorization to assume an interest rate swap with  
14 MEG Energy.

15 MR. MILLER: Yes, sir.

16 THE COURT: I'm astounded that this was unopposed in  
17 the result of the stipulated order, particularly since we have  
18 on the calendar later today a matter involving Metavante, which  
19 is substantially --

20 MR. MILLER: Yes.

21 THE COURT: -- similar in terms of its legal issues.  
22 How did this stipulated order come about?

23 MR. MILLER: I will defer to Mr. Lemons, Your Honor.

24 May we consider, Your Honor, the other items, 2, 3, 4  
25 and 5, as submitted?

1 THE COURT: Yes.

2 MR. MILLER: Thank you.

3 MR. LEMONS: Good morning, Your Honor. Robert Lemons  
4 from Weil, Gotshal & Manges, on behalf of Lehman Brothers.  
5 Your Honor, shortly after we filed the motion seeking  
6 authorization to assume the ISDA and the interest rate swaps  
7 under it, my understanding is MEG Energy and Lehman Brothers  
8 engaged in discussions where MEG indicated that it would be  
9 actually willing to allow Lehman to assume the contract  
10 pursuant to a stipulation, with the one proviso that Lehman  
11 agree in the stipulation that it will purchase an interest rate  
12 cap that will generate cash flows equal to any amounts that  
13 Lehman would have to pay in the future under the contract.

14 THE COURT: What about payment of the 9.7 million  
15 dollars in dispute?

16 MR. LEMONS: MEG Energy is going to pay that amount,  
17 plus an additional amount that represents interest that's  
18 incurred on it, within three business days of entry of the  
19 stipulation.

20 THE COURT: That's a good stipulation.

21 MR. LEMONS: And, additionally, just to complete the  
22 record, Your Honor, the parties have also agreed that all  
23 existing defaults, including as caused by the bankruptcy  
24 filings, are cured upon the assumption and that LBHI shall no  
25 longer be a guarantor under the agreement.

1 THE COURT: Okay, thank you.

2 MR. LEMONS: So we'll be submitting that later today  
3 for Your Honor. Thank you.

4 MR. BERNSTEIN: Good morning, Your Honor. Mark  
5 Bernstein from Weil, Gotshal & Manges, on behalf of the  
6 debtors. The next two motions on the agenda relate to omnibus  
7 procedures that the debtors are seeking to establish to enable  
8 them to officially manage and monetize their portfolio of  
9 commercial and residential mortgage loans. The debtors believe  
10 that the transactions entered into pursuant to these two  
11 motions are transactions of the ordinary course of their  
12 business. However, the debtors worked over the last few months  
13 with the creditors' committee to come up with procedures that  
14 would increase the transparency and formalize a protocol for  
15 the approval of such transactions between the debtors and the  
16 committee.

17 The first motion, which is item number 7 on the  
18 agenda, seeks to establish procedures by which they may  
19 transfer residential or commercial mortgage loans immediately  
20 prior to foreclosure into wholly-owned subsidiaries of the  
21 applicable debtor and then procedures by which that subsidiary  
22 may sell such loan and then distribute the cash back up to the  
23 applicable debtor.

24 The purpose that -- the purpose for which the debtors  
25 want to enter into these types of transactions, which are

1 typical in the mortgage lending field, are that acquiring  
2 properties pursuant to a foreclosure makes the debt -- makes  
3 the -- that entity subject to liabilities, tort or  
4 environmental or other type, by acquiring the property. So by  
5 putting the property down into an SPE, it shields the debtors'  
6 assets from those liabilities while at the same time retaining  
7 the economic benefit.

8 The second motion, which is number 8, and we can take  
9 these together or take them apart since they are somewhat  
10 similar --

11 THE COURT: Why don't we take it together.

12 MR. BERNSTEIN: Sure. The second motion, number 8,  
13 relates to the acceptance of the debtors of discounted payoffs  
14 or modifying the terms of residential mortgage loans. In many  
15 instances, entering into these transactions is an economic  
16 benefit to the debtors rather than risking nonpayment of such  
17 loans or letting such loans go into default and foreclosure.

18 The procedures were put in place, as I said, in  
19 cooperation with the creditors' committee, and there are  
20 various thresholds or triggers which require creditors'  
21 committee approval prior to entering into such transaction.

22 THE COURT: I noted the statements of the committee in  
23 support of both of these motions as well as the ad hoc group of  
24 Lehman Brothers creditors, sometimes referred to as the hedge  
25 funds. And that suggests, to me at least, that this is a

1 process that has been openly vetted with the constituencies  
2 that you need to deal with, and these procedures appear to be  
3 appropriate.

4 MR. BERNSTEIN: I would just add one more thing, Your  
5 Honor. There have been a couple comments and conversations the  
6 debtors have had since we filed the motions, and we've made  
7 some slight changes to the motions providing for some public  
8 disclosure at the request of the ad hoc group of Lehman  
9 Brothers creditors. It is a quarterly report that just  
10 provides the number of loans and the aggregate of all those  
11 loans for which such transactions were entered into. And in  
12 the motion and the order -- proposed order for number 7 on the  
13 agenda, which relates to the transfer of loans and special-  
14 purpose entities, we also added provisions relating to the  
15 preservation of rights of parties who may have other interests  
16 in these loans, such as participations or pledges, saying that  
17 this -- these procedures don't diminish their interest in any  
18 way.

19 THE COURT: Okay. This is uncontested. I'll just  
20 ask, because there were statements of support, if anyone wishes  
21 to be heard with respect to either number 7 or 8 on the agenda.

22 MR. O'DONNELL: Good morning, Your Honor. Dennis  
23 O'Donnell, Milbank, Tweed, Hadley & McCloy, on behalf of the  
24 official committee. I'll simply concur with Mr. Bernstein's  
25 remarks about these motions. We have worked closely together

1 for the past couple of months and we have, I think, improved  
2 the procedures as originally proposed to ensure that there are  
3 protections against transactions with insiders, transactions  
4 with multiple purchases, transactions to various sorts, and  
5 ensure that the committee will be able to have a full and  
6 complete review of these transactions before they go forward  
7 or -- and to the extent that they hit certain thresholds that  
8 actually come to the Court as well. And based on what has been  
9 an open and cooperative process, we believe that this motion --  
10 both these motions should be approved.

11 THE COURT: Fine. They're both approved.

12 MR. MILLER: The next matter on the calendar, Your  
13 Honor, under contested matters is the motion of the Rentenbank  
14 and for authority to conduct Rule 2004 examinations.

15 MR. TRETTER: Good morning, Your Honor. Lyndon  
16 Tretter of Hogan & Hartson, for Rentenbank. We're here on a  
17 2004 discovery application. And what we've been accused of  
18 doing in the opposition papers is supposedly advancing our  
19 defense in a U.K. action. It's absolutely not true, Your  
20 Honor. We wish that U.K. action did not exist.

21 What we're trying to pursue here is the question of  
22 substantive consolidation.

23 THE COURT: Why do you need to pursue that now?

24 MR. TRETTER: Well, Your Honor, it's been a year, and  
25 the question will be --

1 THE COURT: It's hardly before the Court at this  
2 point.

3 MR. TRETTER: Well --

4 THE COURT: It's been a year. You're saying that it's  
5 now September 15, 2009 and that it means that it's time for  
6 individual creditors to take discovery with respect to  
7 substantive consolidation months before the examiner completes  
8 his work?

9 MR. TRETTER: Well --

10 THE COURT: You must be kidding.

11 MR. TRETTER: I'm not kidding, Your Honor.

12 THE COURT: I think you must be.

13 MR. TRETTER: Okay. If you're saying --

14 THE COURT: Why do you need this discovery now if it's  
15 unrelated to the U.K. action?

16 MR. TRETTER: Well, Your Honor, some --

17 THE COURT: Is it related to the U.K. action or not?

18 MR. TRETTER: No, Your Honor. We are --

19 THE COURT: Then why do you need it now?

20 MR. TRETTER: We don't need it this second, but we  
21 need to start it at some point, and some point this --

22 THE COURT: That some point will not be now. Your  
23 motion's denied without prejudice.

24 MR. TRETTER: Thank you, Your Honor.

25 (Pause)

1 MR. GRUENBERGER: Good morning, Your Honor.

2 THE COURT: Good morning.

3 MR. GRUENBERGER: Peter Gruenberger, Weil, Gotshal &  
4 Manges, for the debtors. May it please the Court. I rise  
5 again in support of the debtors' motion for the Court to  
6 implement derivatives ADR procedures and to enter a proposed  
7 order that includes mediation as a major component of ADR.

8 Your Honor was absolutely correct on August 15th to  
9 continue this hearing until today. The debtors and the  
10 creditors' committee in fact did make a great deal of progress  
11 with derivatives counterparties and indentured trustees to make  
12 further changes to the proposed order.

13 In my supplemental declaration filed last Friday, we  
14 put forth the report Your Honor requested that the debtors and  
15 creditors' committee file concerning that progress and the  
16 results we obtained from further negotiations and discussions  
17 in that almost three-week period. That report details the  
18 great efforts we made and the many accommodations we gave  
19 that -- as many as we reasonably could, to derivatives  
20 counterparties and indentured trustees regarding further  
21 substantive changes to the revised proposed order compared with  
22 the one that was before you on August 26th.

23 To that end, we distributed three separate post-  
24 hearing revised orders to all remaining objectors, and there  
25 were fifty-six such remaining objectors left. Those changes

1 reflected twenty-two new changes that were made to the August  
2 26 form of proposed order, and those changes were in addition  
3 to the original twenty-two changes we had made to the original  
4 proposed order we had attached to our motion. Thus, there were  
5 forty-four substantive changes, different ones made by us, in  
6 the proposed orders. Those three new revised orders are  
7 attached to my supplemental declaration as Exhibits A, C and G.

8 In addition, we sent e-mails to every remaining  
9 objector, whether counterparty or indentured trustee, asking  
10 them to inform us whether they were withdrawing their  
11 objections in toto and, if withdrawn in part only, which  
12 grounds remained. And we asked those remaining objectors for  
13 suggested substantive language changes to aid in the process.  
14 Those e-mails were attached to my supplemental declaration as  
15 Exhibits B, D and F.

16 In aggregate, of the fifty-six objectors remaining as  
17 of the August 26th hearing, as of this morning forty-one  
18 objectors have withdrawn their objections entirely, leaving  
19 fifteen remaining counterparty objectors. And all indentured  
20 trustees have withdrawn their objections entirely.

21 Further, as of August 26th, all objectors had asserted  
22 in aggregate a total of sixty-eight different grounds of  
23 objection. That number has been reduced to approximately  
24 forty-five different grounds remaining as of today. Those  
25 results are reflected in Exhibit G to my supplemental

1 declaration, which is the same chart that we presented to Your  
2 Honor on August 26, except we now added two columns on the  
3 right side of Exhibit G to reflect the original number of  
4 objectors and remaining number of objectors per each ground of  
5 stated objection.

6 All the modifications we made between August 26 and  
7 September 14 are cumulatively shown in the final post-hearing  
8 revised order we filed with the Court yesterday in both  
9 blacklined and clean versions.

10 So much for the good news, Your Honor. Now the not-  
11 so-good news. I too was correct, Your Honor, on August 26 in  
12 predicting that no matter what debtors and creditors' committee  
13 did, there would be some counterparties who would dig in. That  
14 in fact turned out to be the case. In that regard, seven  
15 counterparties of the remaining fifteen objectors simply have  
16 ignored our three requests for some kind of response. They  
17 just failed to respond to us altogether. An additional four of  
18 the fifteen remaining counterparties objectors have not told us  
19 which of their asserted grounds of objection remain.

20 So eleven out of fifteen objectors remaining, or about  
21 seventy-five percent of them, have kept us all in the dark. We  
22 don't know whether they still object on all or any of their  
23 asserted grounds. Not one of these remaining eleven objectors  
24 stood up on August 26 to say anything in response to Your  
25 Honor's request that day that asked whether waiting until

1 September 15th would be fruitless. They said nothing. We  
2 interpreted that silence as being a very good sign, and for a  
3 vast majority of the objectors it was a good sign. For these  
4 eleven, however, we were wrong in our estimation of what that  
5 silence meant.

6 At this point I'd like to thank the vast, vast  
7 majority of counterparties who, despite their differences with  
8 us and with the creditors' committee -- for having acted in a  
9 fair, balanced and responsive manner to the charge Your Honor  
10 gave all of us to go back and do the best job we could. I  
11 think we've done it.

12 Before turning to the remaining fifteen objections,  
13 Your Honor, I am sure the creditors' committee wishes to be  
14 heard, and I would hope that Your Honor would allow any  
15 objectors who have withdrawn their objections entirely to  
16 speak, if they wish to do so, about the process and the  
17 experiences we had. And we can come back to the remaining  
18 objections if Your Honor will allow us to do that.

19 THE COURT: Okay, I'll hear from the committee,  
20 although it seems to me that in the end it's going to be more  
21 important for me to hear from those parties who are still  
22 pressing their objections.

23 MR. GRUENBERGER: Yes, of course, Your Honor.

24 MR. COHEN: Good morning, Your Honor. David Cohen  
25 with Milbank, Tweed, Hadley & McCoy, here on behalf of the

1 official committee of unsecured creditors. As Mr. Gruenberger  
2 noted, the committee has worked with the debtors since the  
3 inception of the idea for ADR. The committee strongly believes  
4 it's necessary and appropriate. We've worked with the debtors,  
5 both before filing the original motion and after the subsequent  
6 hearings, to come up with procedures that were largely  
7 consensual. I think we're there as far as we can get. There  
8 are very few remaining objections.

9           There is one remaining objection to the participation  
10 of the committee; I'm happy to address that now or after that  
11 party makes the objection.

12           THE COURT: Well, you're standing. Why don't you  
13 address it now?

14           MR. COHEN: Certainly. The committee has already  
15 played an important role in this process. The committee has  
16 brought together a number of counterparties and the debtors.  
17 In my own conversations with a number of derivatives  
18 counterparties as a result of these negotiations, they took  
19 great comfort in the fact that the committee would be part of  
20 this process and would serve as a check on concerns involving  
21 fears that the debtors would somehow act improperly.

22           A specific example of this is paragraph 3A of the  
23 revised proposed order, which deals with termination and which  
24 transactions can be channeled through ADR. Several objectors  
25 wanted it made clear that the expectation is that the

1 termination language is largely intended to apply to  
2 counterparties, that there may be certain instances where the  
3 debtors have termination rights.

4 In exchange for me making that statement and that  
5 clarification here on the record, two derivatives  
6 counterparties were willing to withdraw their objection:  
7 Oceania actually withdrew, and the Hebron Academy, whose  
8 objection is at docket number 4572, has told me that it  
9 should -- I can represent to the Court that it does not oppose  
10 entry of the revised order.

11 Clearly, the committee has played, and will continue  
12 to play, an important role here. Second, the committee's  
13 duties under Section 1103 and its right to be heard under  
14 Section 1109 of the Bankruptcy Code make clear that the  
15 committee should be part of the process. The ADR envisioned by  
16 this motion in the revised proposed order involves hundreds of  
17 transactions and hundreds of millions of dollars. Excluding  
18 the committee from this process would effectively prevent the  
19 committee from exercising its statutory obligations and its  
20 rights.

21 THE COURT: Let me ask you a question --

22 MR. COHEN: Certainly.

23 THE COURT: -- just about what the committee's role is  
24 going to be as you envision it. Are you there as a cheering  
25 section for the debtor, are you there as an extra mediator to

1 act as a go-between, or are you there as an observer? Or do I  
2 have it wrong as to all of those categories?

3 MR. COHEN: It is actually much more fluid than the  
4 Court just suggested. Under the revised proposed order, the  
5 committee would consult with the debtor in setting the initial  
6 demand. The committee would also have a consultive (sic) role  
7 in responding to any counteroffer. So it would work like the  
8 December derivative settlement order where the committee plays  
9 a role in determining what is an acceptable range with which to  
10 settle. And so it's got two consultive roles: one, with the  
11 initial demand, and second, with the counteroffer.

12 With respect to the actual mediation itself, the  
13 committee may participate but it's not required to participate.  
14 So what the committee envisions is that it would not be sitting  
15 at every mediation. There would be some where the dollar  
16 amounts or the legal issues were significant that the committee  
17 felt it was appropriate that it be part of that process. And  
18 the committee, having weighed in formally both on the initial  
19 offer and the counteroffer, would then be in a position to  
20 agree if a settlement were achieved as the result of a  
21 mediation, whether the committee was there or not, as to  
22 whether it was appropriate to be settled under the December  
23 derivative settlement order.

24 THE COURT: Okay. Thanks for that.

25 MR. COHEN: So we also think the fact that there are

1 three ways to settle disputes as a result of mediation under  
2 the December order, the January assignment order or a 9019  
3 suggests that the committee should be involved. If the  
4 committee is not involved in mediation, then effectively every  
5 settlement that comes out of mediation has to come before the  
6 Court on a 9019 motion. The committee then would have to,  
7 after the fact, look at the facts, the legal arguments and the  
8 merits and be revisiting the debtors' business judgment. We  
9 think that that hinders efficiency, overly burdens the Court  
10 and is unnecessary.

11 The other concern that certain counterparties have  
12 raised is that the committee's participation somehow undermines  
13 the confidentiality of mediation. We think this argument is  
14 frivolous. The committee would be bound by the confidentiality  
15 provisions just as every other party to the mediation.

16 We think that the revised proposed order is necessary  
17 and appropriate, and we would request that the Court enter that  
18 order.

19 THE COURT: Okay, thank you for your statement of  
20 position.

21 MR. COHEN: Thank you.

22 THE COURT: Mr. Gruenberger --

23 MR. GRUENBERGER: Your Honor --

24 THE COURT: -- do you have a suggestion for managing  
25 this process now?

1 MR. GRUENBERGER: Yes, Your Honor. I don't know if  
2 there's any counterparty or indentured trustee here today that  
3 wants to say something in support of the order or not. If not,  
4 Your Honor --

5 THE COURT: Well, some people are jumping up. All of  
6 a sudden your invitation has --

7 MR. GRUENBERGER: I'm sorry?

8 THE COURT: -- has gotten some traction out there.

9 MR. GRUENBERGER: I see Eric Schaffer, Your Honor.

10 MR. SCHAFFER: Your Honor, Eric Schaffer, Reed Smith,  
11 for BNY Corporate Trustee Services, Bank of New York Mellon.  
12 As we were one of the focuses of the discussion at the last  
13 hearing on this, I want to confirm everything that Mr.  
14 Gruenberger said. We did have a very good give-and-take. We  
15 resolved all of our issues to our mutual satisfaction.

16 THE COURT: Good.

17 MR. ANTONOFF: Good morning, Your Honor. Rick  
18 Antonoff from Pillsbury Winthrop, on behalf of the Embarcadero  
19 Asset (sic) Securitization Trust, known as EAST, which is a  
20 derivatives counterparty. We filed a -- well, we terminated  
21 our swap agreement soon after our counterparty commenced its  
22 bankruptcy case, and there was a dispute as to the calculation  
23 of our settlement amount. There's been some correspondence but  
24 there's still a gap in terms of resolving that dispute.

25 We did file a limited objection. We certainly have no

1 objection to there being mediation, and we actually welcome a  
2 fair and efficient method of resolving our dispute as well as  
3 the many other derivatives disputes. Our concern -- and I  
4 should say that in our limited objection we raised about a half  
5 a dozen issues, all of which, except for the committee's  
6 participation, has been resolved.

7 And I -- with apologies, we are one of the parties  
8 that did not respond to the e-mails that came since the August  
9 26th hearing. But I do have a concern -- we have not withdrawn  
10 our objection. I do have a concern with the committee's  
11 participation along the lines, I think, that the Court was  
12 questioning committee counsel, but I think a question that I  
13 would want answered is whether the committee intends to file  
14 papers and to present argument to the mediator. We have no  
15 objection to the committee attending mediation, consulting with  
16 the debtor. We do think that that is an efficient process and  
17 a way to avoid having to bring 9019 motions and so forth. And  
18 certainly the scope of the existing derivatives orders that  
19 have been entered -- this, what I'm suggesting, would be  
20 consistent with the previous orders. And I don't read either  
21 1103(c) or 1109(b) as giving the committee the right to be  
22 heard in a mediation since it's an alternative to court  
23 litigation.

24 And so I would just ask that the -- any order that is  
25 entered allow the committee the consultative observation type

1 of rule that they ought to have in order to keep the process  
2 efficient but that they not be permitted to file papers and  
3 address the mediator in argument, as I think that that amounts  
4 to essentially a piling-on, which would make the process  
5 unfair. Thank you.

6 THE COURT: Okay.

7 Are there any other parties who wanted to respond to  
8 Mr. Gruenberger's invitation to come up and tell me what a good  
9 job Mr. Gruenberger and his people have been doing?

10 MR. GRUENBERGER: Thanks for the endorsement.  
11 Turning --

12 THE COURT: Apparently very few people want to do  
13 that --

14 MR. GRUENBERGER: Yeah, I --

15 THE COURT: -- Mr. Gruenberger.

16 MR. GRUENBERGER: -- I expected that. As to the  
17 remaining fourteen, now, objections, Your Honor, we will of  
18 course abide by your decision of how to handle it and approach  
19 those. You can determine who those fourteen are if you would  
20 look, please, at item 10 on today's agenda at pages 6 and 7.  
21 And the remaining objectors are designated by letters A through  
22 G, and I through P, except for Embarcadero, which just  
23 withdrew.

24 So my recommendation, Your Honor, if you'll permit  
25 me --

1 MR. ANTONOFF: We did not withdraw, just --

2 MR. GRUENBERGER: Excuse me?

3 MR. ANTONOFF: We did not withdraw.

4 MR. GRUENBERGER: Withdraw subject to what was argued  
5 by counsel.

6 Sorry.

7 THE COURT: Just so the record is clear, when you said  
8 "I withdraw", would you just re-identify yourself for the  
9 record?

10 MR. ANTONOFF: Yes, I'm sorry. It's Rick Antonoff  
11 with Pillsbury Winthrop, on behalf of the Embarcadero Asset  
12 Securitization Trust. Thank you, Your Honor.

13 THE COURT: Okay.

14 Anybody else who would like to stand up and withdraw  
15 is welcome to do that. I just want to know who's still an  
16 active objector. Why don't -- if there's anybody who's out  
17 there -- and I don't mean to put any pressure on anybody who's  
18 objecting -- who wants now to be off the list of objectors,  
19 this is a good time to do that.

20 MR. GRUENBERGER: Embarcadero, Your Honor, is objector  
21 number D on page 6. So the remaining objectors so far are A  
22 through C, E through G, and I through P.

23 THE COURT: I think we have one --

24 MR. GRUENBERGER: Do we have a candidate?

25 MR. LAGUARDIA: Yeah.

1           Your Honor, Daniel Laguardia, Sherman & Sterling, for  
2 Bank of America. We informed the debtors before the hearing  
3 began that we would withdraw our objections as well.

4           THE COURT: Fine.

5           MR. GRUENBERGER: Yeah, they were 8, Your Honor. I  
6 had counted them in the --

7           THE COURT: Okay. So let's just --

8           MR. GRUENBERGER: -- fifteen.

9           THE COURT: -- let's just go down the list in the  
10 order in which --

11          MR. GRUENBERGER: Right. Yeah.

12          THE COURT: -- they're listed.

13          MR. GRUENBERGER: That was my recommendation, Your  
14 Honor, that we go down the list and we see what's left in order  
15 of what's on the agenda, if that's okay with Your Honor, and  
16 let them come up and tell us --

17          THE COURT: Okay, Wellmont --

18          MR. GRUENBERGER: -- and then we can respond.

19          THE COURT: -- Wellmont Health Systems. Is anybody  
20 here or in person or on the phone?

21          The objection is denied for lack of prosecution.

22          EPCO Holdings? Mr. Goodman?

23          MR. GOODMAN: Good morning, Your Honor. Peter  
24 Goodman, Andrews & Kurth, on behalf of EPCO Holdings, Inc.  
25 Your Honor, EPCO Holdings noted in its response that it did not

1 object to the concept of mediation. Rather, it submitted that  
2 certain of the procedures proposed by the debtors were overly  
3 burdensome, unnecessarily complicated and would not facilitate  
4 mediation. We believe even after the modification some of  
5 those issues exist. Mediation is designed to be a flexible and  
6 cooperative process.

7 THE COURT: What are the specific problems that you  
8 have?

9 MR. GOODMAN: Okay, Your Honor, I'll get to that. We  
10 did respond to Mr. Gruenberger on September 1st and then again  
11 to Mr. Sinn (ph.) on September 6. One of our concerns is the  
12 sanction provisions. Under the sanction provisions, the  
13 remedies include basically giving the debtors the relief that  
14 they are requesting in their notice. We do not believe that  
15 that is proper to put in the mediation order. Rather, we  
16 believe that the debtors should rely on general order M-143,  
17 which is already encompassed in the proposed order and does  
18 allow for sanctions, which would be determined by Your Honor  
19 without specifying what those sanctions will be.

20 In a sense, the parties are agreeing up front that  
21 that is a possible remedy, and we don't believe that that is  
22 really appropriate for this mediation --

23 THE COURT: Actually, nobody's agreeing to that.  
24 That's going to be, if it's included in the order, an order.  
25 So it's, I think, therefore in terrorem effect, and it is

1       precisely the fact that there is an adverse consequence that  
2       may make the process that much more efficient and workable.  If  
3       parties to this recognize that they are at risk of actually  
4       losing, they'll probably show up.  I suspect your client will  
5       show up if they recognize that there's that risk.

6               MR. GOODMAN:  Our party -- my client does intend to  
7       show up --

8               THE COURT:  Great.

9               MR. GOODMAN:  -- and participate in the mediation.

10              THE COURT:  Okay.  I'm just going to mention to you  
11       that I have no problem with the sanctions as proposed.  I've  
12       reviewed the order and I'm satisfied with the order in its  
13       present form.

14              MR. GOODMAN:  I understand, Your Honor.  Thank you.  
15       The next issue is the situs of the mediation.  We believe that  
16       the situs of the mediation should be left up to the mediator.  
17       My client is based in Houston.  I note that Weil Gotshal has  
18       offices in Houston.  And rather than setting the mediation in  
19       New York, unless other parties agree otherwise --

20              THE COURT:  Well, the adversary proceeding is going to  
21       be in New York, so why not the mediation?  If your client  
22       doesn't agree, you're going to end up in a litigation in this  
23       bankruptcy court.  This is not a bankruptcy that is happening  
24       in Houston --

25              MR. GOODMAN:  I understand.

1 THE COURT: -- or Los Angeles or Chicago or Maine or  
2 Florida. It's happening here.

3 MR. GOODMAN: I understand, Your Honor, but the  
4 mediation -- this is mediation and it's not an adversary  
5 proceeding.

6 THE COURT: I understand, but it's in lieu of an  
7 adversary proceeding; hopefully in lieu of.

8 MR. GOODMAN: The next item, Your Honor, is, we  
9 believe, the revised proposed order retains unnecessary time  
10 constraints on the initial settlement conference. I noticed  
11 that the debtor did amend the time to respond to its request  
12 where the debtors would give certain dates for mediation from  
13 two business days to four business days, but the order still  
14 provides that the parties -- the responding party must respond  
15 to one of the dates listed in what the debtors propose by one  
16 of the dates that the debtors propose, which is five days from  
17 the earliest request.

18 Again, I just think that this process should be more  
19 flexible, particularly with the dates for initial settlement  
20 conference. We would like to participate in that conference,  
21 and I just asked -- we requested that the debtors give greater  
22 flexibility in the timing of that settlement conference.

23 Lastly, Your Honor, the selection of the mediators.  
24 We believe that the counterparties involved in the mediation  
25 should have input in the decision-making process of who the

1 mediator should be out of the pool. That often happens in  
2 mediation; in fact, every mediation that I've participated in,  
3 the counterparty or the other party to the mediation is  
4 involved in the selection process.

5 THE COURT: Mr. Goodman, I understand your point, and  
6 I'm reminded of a case that we had together when I was still in  
7 practice that involved the selection of a mediator, and it took  
8 months because of conflicts of interest and problems of getting  
9 mediators to be willing to participate in that dispute.

10 This is not standard mediation. This is global  
11 mediation. This is an order that will be a one-size-fits-all.  
12 That means that the particulars that your client wishes are  
13 just wishes. They can't be the rule of the game that the least  
14 common denominator becomes what derails the process. In  
15 effect, what you're suggesting -- and I appreciate the fact  
16 that you're the first person to stand up and formally object  
17 after a process that has been designed to make objections like  
18 yours go away. I'm disappointed that your objection has not  
19 gone away, as I am with respect to the rest of the alphabet  
20 that I'm about to hear.

21 I believe that the process that has been run to get us  
22 to this point is a fair one, that the order which has resulted  
23 from this process is perhaps not perfect for everyone but it  
24 represents an extraordinary achievement under the circumstances  
25 and one that I'm prepared to enter.

1 I'm going to hear everybody's objection as I have  
2 heard yours, but just to shorten the process a little bit,  
3 everybody should recognize that flexibility is going to destroy  
4 the process unless it's for good cause shown within the context  
5 of a mediation which has been started consistent with the  
6 order.

7 I am confident that for mediation to work requires  
8 give and take, reasonable behavior on the part of everyone  
9 who's involved. But to deconstruct the proposed order at the  
10 outset is to make the mediation process anything but efficient.  
11 And to have mediations happening all over the country,  
12 including Houston, or to have mediations with different  
13 mediators, each one of which is going to have to get up to  
14 speed on the nature of an industry that is itself pretty  
15 complex, to me is a recipe for complexity and delay.

16 For that reason, I don't find any of your arguments  
17 compelling. I'm letting you know that now.

18 MR. GOODMAN: All right. I understand, Your Honor.  
19 Thank you.

20 THE COURT: Okay.

21 Easton Investments?

22 UNIDENTIFIED SPEAKER: Easton Investments?

23 THE COURT: Is there anyone here for Easton?

24 It's denied for lack of prosecution.

25 Royal Bank of Scotland? Mr. Bienenstock, good

1 morning.

2 MR. BIENENSTOCK: Good morning, Your Honor. Martin  
3 Bienenstock of Dewey & LeBoeuf, for Royal Bank of Scotland PLC  
4 and its affiliates. Your Honor, we'd certainly listen to what  
5 Your Honor has said. And hopefully the reason I still rose to  
6 come to the podium to ask Your Honor to give us relief in  
7 respect of three points is because of the following. We did  
8 not object to the concept of mediation, ADR, et cetera, the  
9 Court's power, et cetera. Our objections at all times were  
10 designed, number one, for -- to maximize the likelihood of  
11 success, and number two, to maintain evenhandedness and  
12 fairness. And those are the things that I'm -- the three  
13 things that I'm going to be asking Your Honor about now.

14 There is a provision in the order that goes -- the  
15 proposed order, that basically says that participation in the  
16 process shall be without prejudice to any parties, jury trial  
17 rights, forum selection rights, et cetera. We did respond to  
18 Mr. Gruenberger's e-mail, and we made the following comment:  
19 Simply add, after "without prejudice to jury trial rights",  
20 "Article 3 rights", because a party may not want a jury trial  
21 but may still want an Article 3 Court for whatever purpose.  
22 That was simply rejected.

23 In the debtors' response to our initial rejection, it  
24 responded specifically to us to say, well, Royal Bank of  
25 Scotland filed two proofs of claim attached as exhibits to

1     their pleading, so they can't even raise this issue because  
2     they wouldn't have Article 3 rights.  Actually, Your Honor,  
3     their attachment of the two proofs of claim proves our point.  
4     We have many entities and affiliates:  ABN AMRO Bank, ABN AMRO  
5     Incorporated, Sempra Energy, et cetera.  There are no proofs of  
6     claim attached for those entities.  The entities that are owed  
7     money by the various debtors' estates in many cases are  
8     different from the entities they contend owe money to them.

9             So we have not -- with a lot of bravado, they tried to  
10    reject our proposal.  But the bottom line is we have not waived  
11    our Article 3 rights by filing proofs of claim for most all of  
12    the entities that I'm here representing that are affiliates.  
13    And it's certainly just basic fairness to add the words "or  
14    Article 3 rights" to their reservation of parties' rights on  
15    jury trial, et cetera.  That's point number one.

16            Point number two, Your Honor, is, in our initial  
17    objection, we asked that the debtor provide counterparties with  
18    the same questionnaire answers as the debtor was requesting  
19    that counterparties provide when they file proofs of claim.  
20    And we were here in August when Your Honor rightly observed  
21    that civilized people were at the beach.  And we heard Mr.  
22    Gruenberger say that that's wrong, the Court ruled on that in  
23    another context that we shouldn't get that.

24            So we tried -- although we don't agree with Mr.  
25    Gruenberger's comments, it is important, if this process is

1 going to be successful, that the counterparties being asked to  
2 pay money have information on which to base their request.

3 The debtors explained the contrast in their initial  
4 pleading by saying, well, they need the information because  
5 they have a statutory duty under the Bankruptcy Code to review  
6 proofs of claim. There's sort of a negative implication that  
7 the rest of us responsible to boards of directors and  
8 shareholders can just write checks without information, which  
9 of course is wrong. So how can we forward the process with the  
10 information?

11 I would also point out, Your Honor, that although the  
12 debtor takes great comfort in advising the Court that it's  
13 working off of this Court's mediation order, the order, Your  
14 Honor, in section 3.1, talks in terms of a Court being able to  
15 send things to mediation before the Court's final evidentiary  
16 hearing. In other words, the mediation order, the standing  
17 order of this Court, contemplates an extant contested matter or  
18 adversary proceeding in which discovery is available, and then  
19 the Court can send things to mediation, whereby we don't have  
20 that process here. We have the ADR mediation process before  
21 there's a pending adversary proceeding or contested matter. So  
22 there's no proceeding in which to ask for discovery.

23 So we ask -- in deference to Mr. Gruenberger's  
24 statements, even though we don't agree with them, we ask for  
25 the following: that if a party gets an ADR notice which is

1 attached as Exhibit A to their proposed order, which, as Your  
2 Honor will see, doesn't require them to provide virtually any  
3 data whatsoever except what they voluntarily decide to provide,  
4 that a party can respond by saying we can't make a counteroffer  
5 without the information that would have been answered in the  
6 questionnaire. And before the party gets hauled into a  
7 mediation, with the time and expense that that involves, the  
8 debtor should provide that information so hopefully then the  
9 counterparty has enough to make a counteroffer. We think  
10 that's designed to make this process work as opposed to make  
11 sure that it doesn't work.

12 Now, of course the debtor can say, well, if you ask us  
13 for information, why wouldn't we provide it? Well, they can  
14 provide information that you think of asking for but not the  
15 full range in the questionnaire or not -- it's much more  
16 comforting to a party if there's a set of information they must  
17 provide so you know you're not missing something by some  
18 accident. And it's designed to make this work in advance of  
19 going to mediation.

20 So we can't -- finally, Your Honor, appearances. It  
21 just doesn't look right from a process point of view. From  
22 a -- we hope from a judicial point of view that, when parties  
23 file a proof of claim, they have to provide these questionnaire  
24 answers, but when the debtors want money from other par -- and  
25 that's when -- parties are filing proofs of claim to get

1 bankruptcy dollars; you know, whatever cents on the dollar are  
2 ultimately going to be given. But when they want a hundred  
3 cent cash, U.S. dollars, from the rest of us, they don't have  
4 to give us information? It just doesn't -- it doesn't seem  
5 fair; it doesn't appear fair.

6 So we think, for all those reasons, there ought to be  
7 this safety mechanism in the process where, if a party says I  
8 need the information before I make the counteroffer, they have  
9 to give it.

10 My last point, Your Honor, is the committee. As the  
11 committee just explained, it deems frivolous, as it just said,  
12 counterparties' concerns for confidentiality in having the  
13 committee out of the room because the committee is bound by the  
14 confidentiality order. Well, Your Honor, the committee has  
15 entities on -- financial entities on it that are in the same  
16 financial derivatives trading space. They can't keep things  
17 confidential from themselves.

18 So, again, in deference to respecting the role of the  
19 committee, generally we suggested a middle-ground sensible  
20 approach where the committee can participate, but if in  
21 certain -- if in discussions and mediation the counterparty  
22 determines that it really wants to tell the debtor something  
23 but it's proprietary information, it's sort of like a trade  
24 secret trading strategy; they can ask that the committee leave  
25 the room. That's just reasonable, and we should have that

1 right, because there's no way the committee members can keep  
2 information confidential from themselves. They'll have it.

3 Those are our three points, Your Honor. We think  
4 they're each designed to promote the likely success, not to  
5 detract from it. We think it will promote the appearance of  
6 fairness here, and we think it will promote the protection of  
7 all parties vis-a-vis the Article 3 point.

8 THE COURT: Yeah, let me find out from Mr. Gruenberger  
9 why he disagrees, if he does, with the things you've just  
10 stated.

11 MR. BIENENSTOCK: Thank you, Your Honor.

12 MR. GRUENBERGER: I have a direct answer for that  
13 question, Your Honor: I disagree one hundred percent with  
14 everything that Mr. Bienenstock said, everything.

15 THE COURT: Why am I not surprised?

16 MR. GRUENBERGER: I didn't want to surprise anybody.  
17 Mr. Bienenstock's opening remark this morning was that he had  
18 no question about the Court's power, he was just going to talk  
19 about three things. Yet he managed to get seven of his  
20 original fourteen objections, many of which had to do with the  
21 Court's power, into his later statements that belied his  
22 opening remark.

23 Mr. Bienenstock failed to tell us which of his  
24 arguments -- there were fourteen of them -- grounds of  
25 objection were withdrawn. I still don't know which are

1        withdrawn and which are not.

2                His objection stated that counterparties are entitled  
3        to have matters heard by an Article 3 judge. That's flatly  
4        wrong. Mr. Bienenstock should know better. He and I  
5        participated together in a mediation process in Enron. There  
6        was no Article 3 judge involved. Article -- an Article 1 judge  
7        created M-143; that was Judge Lifland. An Article 1 judge  
8        signed the mediation orders, two of them in Enron; that was  
9        Judge Gonzalez. M-143, in its very title and its very words in  
10       section 1.3, says you don't have to have any kind of adversary  
11       proceeding, any matter a judge -- any dispute an Article 1  
12       judge can send to mediation. That is undisputed.

13               Mr. Bienenstock says it's a simple fix, just stick in  
14       "Article 3" into paragraph 14 along with jury trials. If Mr.  
15       Bienenstock has a right to an Article 3 judge at any point for  
16       any one of his clients or subsidiaries or affiliates, all he  
17       has to do is use Article -- I'm sorry, paragraph 5 on page 5 of  
18       the order. It says "All rights, remedies, claims and defenses  
19       of a derivatives counterparty and a debtor, in good-faith  
20       compliance with the ADR procedures, shall not be impaired,  
21       waived or comprised in any further proceedings. In these  
22       cases, should no settlement or compromise result from  
23       participation in the ADR." That preserves whatever Article 3  
24       rights he thinks he has.

25               Appearances: For appearances' sake, the debtors ought

1 to file questionnaire answers. Well, what we tried to do in  
2 these procedures, Your Honor, was to have each party, the  
3 debtors' side and the counterparties' side and indentured  
4 trustee's side, give a brief explanation of what the parties'  
5 position is. Not evidence; it's noticed pleading. And we  
6 attached forms that gave each side the same amount of  
7 information.

8 Now, Mr. Bienenstock makes an assumption that he wants  
9 to create the same exact tit-for-tat goose-for-the-gander  
10 proposal that was denied in the bar date order proceedings.  
11 The debtors were asked to provide the same things then; didn't  
12 happen. Court said no, and now through the side door he wants  
13 it.

14 But let's look at what really in reality this means.  
15 Let's assume a counterparty doesn't have a claim at all, never  
16 files the questionnaire. We're supposed to file the same  
17 questionnaire material for that counterparty? For what  
18 purpose?

19 THE COURT: Well, let me break in and just ask a  
20 question about how you envision this process to work, because  
21 as I was hearing Mr. Bienenstock's argument on the  
22 questionnaire information, he was suggesting that as part of  
23 this order there should be some requirement that the debtor, in  
24 effect, provide discovery to the counterparty so that the  
25 counterparty is informed in a manner that is roughly congruent

1 with the information that the debtor will have when a proof-of-  
2 claim questionnaire has been filed in the case by the bar date.

3 My impression of how a mediation of this sort needs to  
4 function if it's to be successful is that there will  
5 necessarily be, if not discovery in the sense that that term is  
6 used in an adversary proceeding, the consensual sharing,  
7 subject to confidentiality restrictions of information  
8 sufficient to support positions.

9 MR. GRUENBERGER: Absolutely right. Absolutely right.

10 THE COURT: I assume that there is nothing within the  
11 order, as it is presently framed and as it may be reasonably  
12 construed, that would limit the ability of the mediator and the  
13 parties during the mediation to share such information as is  
14 appropriate to facilitate the process.

15 MR. GRUENBERGER: On the contrary, Your Honor, the  
16 order, as it now is constituted, promotes the exchange of  
17 information; I'll explain, if I may, how.

18 THE COURT: I think that would be a useful thing for  
19 us --

20 MR. GRUENBERGER: Right now --

21 THE COURT: -- to have on the record now.

22 MR. GRUENBERGER: Right now, if a particular dispute  
23 is chosen for mediation, the debtors, in consultation with the  
24 creditors' committee, will send what's called an ADR notice.  
25 That notice has a couple of things in it. It says here's our

1 demand for settlement, here's the basis for our demand, and  
2 there's a form that is presumptively good that we attach for  
3 ease. They don't have to use the form but that's a  
4 presumptively good form.

5 Thirty days -- within thirty days, the counterparty  
6 who received an ADR notice responds. That response -- again,  
7 we have a form that's a presumptively good form -- says give a  
8 brief explanation of either why you don't agree or what more  
9 you need, or counteroffer or do anything.

10 So let's assume an ADR counterparty sends back a  
11 response that says I'd love to have a little more information.  
12 Now, are we going to go now and try to force a mediation with  
13 somebody who says in good faith that they have insufficient  
14 information? Of course not. That never happened once in the  
15 seventy-seven mediations I had with Mr. Bienenstock in Enron,  
16 never once. We didn't have a bar to entry the mediation with  
17 discovery. The mediator, a good one, will ask how far the  
18 parties are apart; that's one of his first questions after  
19 hello, who are you. A good mediator says that. I know that.  
20 And if one party says I really don't know what the other side's  
21 talking about, we're wasting our time.

22 So, again, what I said on August 26, in Mr.  
23 Bienenstock's presentation there's a presumption that we're in  
24 bad faith, that we are going to waste everybody's time. Of  
25 course not. We have -- after the thirty days goes by, we're

1       supposed to have settlement talks. And in the settlement  
2       talks, if someone says look, I really don't have the  
3       information that you have, help us out, we should have our  
4       number-crunchers talking to each other's number-crunchers to  
5       make sure that we are on the same page. Every mediation I've  
6       been to or I've been party to goes that way. Never has there  
7       been a bar to entry like this one, never. And I've never seen  
8       an order to that effect at all.

9               So that's how it's going to work, Your Honor. And to  
10       require this gate-keeping role of discovery in advance will  
11       impede. We'll have fights about the discovery, we'll have  
12       fights -- Your Honor will be bombarded, we won't get anywhere,  
13       and we'll be back in the ADR -- I'm sorry, we will be replacing  
14       ADR with discovery disputes in an adversary proceeding context.  
15       That's exactly what we want to avoid.

16              Now, once again -- I hope I've answered --

17              THE COURT: You have.

18              MR. GRUENBERGER: -- Your Honor's question.

19              THE COURT: Thank you.

20              MR. GRUENBERGER: With respect to Mr. Bienenstock's  
21       last point about the UCC, they of course will, and will very  
22       well, speak for themselves.

23              But again, from experience, the unsecured creditors'  
24       committee plays a good role in mediation. They played that  
25       role in Enron. They were not barred. There was no

1 confidentiality breach. There was no such concern then. I  
2 think it's a red herring, totally. They should be involved so  
3 that we can get ahead of ourselves, not get behind ourselves,  
4 in terms of settlements. That's the purpose of mediation. And  
5 to bar them, for reasons that I don't understand -- it's  
6 probably beyond my ken to understand that -- I think should be  
7 overruled.

8 So I think all of Mr. Bienenstock's objections should  
9 be overruled.

10 MR. BIENENSTOCK: May I reply briefly, Your Honor?

11 THE COURT: Yes, and I don't know -- I'm trying to  
12 find out if the person who is now anxious to speak is anxious  
13 to speak in connection with the Royal Bank of Scotland matter  
14 or something else.

15 MR. SZYFER: Well, Your Honor -- Claude Szyfer on  
16 behalf of omnibus derivative counterparties. We also filed an  
17 objection with respect to the information balance point. And  
18 so I thought, to streamline things, if I could maybe add a  
19 couple of comments after Mr. Bienenstock that that would  
20 streamline the process, rather than have me go forward maybe a  
21 half hour or an hour now and bring up points that may have  
22 already been discussed.

23 MR. GRUENBERGER: Mr. Szyfer's number 10, Your Honor,  
24 with one having been eliminated in front. So there's only a  
25 few between Mr. Bienenstock and Mr. Szyfer.

1 THE COURT: Why don't we give Mr. Bienenstock an  
2 opportunity to respond. And I think I'm just going to continue  
3 to run down the agenda letter by letter. If it's an issue that  
4 we've already covered thoroughly, you may not have that much to  
5 say.

6 MR. BIENENSTOCK: Your Honor, on the first point on  
7 Article 3, number one, at no time -- contrary to Mr.  
8 Gruenberger's statement, at no time did we say every  
9 counterparty is entitled to an Article 3 Court. What we said  
10 was some are if you haven't filed a proof of claim, as a for-  
11 instance.

12 But, bottom line, what Mr. Gruenberger is now saying  
13 to the Court after saying he disagrees totally with what I  
14 said, he said my Article 3 preservation right is in paragraph 5  
15 of the order as opposed to paragraph 14, which specifically  
16 preserves jury trial rights and forum selection clauses, et  
17 cetera.

18 One way of doing this is for me to, at the appropriate  
19 time, carry around a copy of the order and this transcript.  
20 There certainly is a question why the other rights in paragraph  
21 14 would not similarly be included in paragraph 5.

22 So I think (audio distorted) rights in paragraph 14.  
23 That said, we could defer to the less good lawyering and use  
24 this transcript and Mr. Gruenberger's admission as a solution  
25 to the first issue.

1 THE COURT: Why don't we just defer to the Court on  
2 this. And I'm going to tell you that I accept what Mr.  
3 Gruenberger has said is the intention of the drafter in respect  
4 of paragraph 5 on page 5. And even if it weren't the intent of  
5 the drafter, since it's to become the order of this Court, it's  
6 my view that the purpose of the global ADR procedures to be  
7 made applicable to these various derivative claims are not  
8 intended in any respect to alter substantive rights of the  
9 parties as they exist today, or tomorrow for that matter. The  
10 only way those rights will be altered is if parties enter into  
11 binding settlements by virtue of the process that we're now  
12 initiating. Whether there are Article 3 rights that a  
13 particular counterparty may have, I have no idea. And there's  
14 certainly nothing in the order that, at least in my intention,  
15 is designed to abridge those rights.

16 MR. BIENENSTOCK: Thank you, Your Honor. Okay, point  
17 number two was the questionnaire. Most of the debtors' reply,  
18 Your Honor, really went to providing information in the  
19 mediation. Our aspiration was to get the information provided  
20 in the first process so you maybe never have to get into the  
21 mediation. And certainly there were preparatory statements by  
22 the debtor just now that I guess they amounted in sum and  
23 substance to the notion that, well, if asked, we'll probably  
24 want to provide information, et cetera.

25 We do not believe that the process should depend on

1       that in this adversary process. Even though it's an ADR,  
2       parties are adversaries. And we think it would be much better  
3       if the order expressly protected the counterparties' rights to  
4       get that basic information.

5               We're not talking, Your Honor, about extensive  
6       discovery. We're talking about what collateral did you have,  
7       what valuation technique did you use to determine your damage  
8       claim, what other costs are you referring to; really basic  
9       things that we set out in our proposed questionnaire, which  
10      was, as Your Honor mentioned, was an analogue to the debtors'  
11      questionnaire.

12             And then -- well, the committee hasn't responded to  
13      our last request, so I obviously don't have a reply to that.

14             THE COURT: Okay.

15             MR. BIENENSTOCK: One other point, Your Honor, which I  
16      think goes -- further supports all of our requests, on page 1  
17      of the debtors' proposed order, the debtors are asking Your  
18      Honor to make a finding that there are a lot of common-fact  
19      issues in the ADR proceedings that would be initiated under  
20      this matter. That itself presents an issue as to, well, when  
21      you're called into this ADR, if there are -- and there are  
22      going to be setoff issues, I'm sure, that are common -- they  
23      mention that in their proposed order as one of the common  
24      issues, valuation issues, et cetera -- do you want to settle  
25      this before or after the Court gives its rulings on these

1 issues?

2 I think if the data is given to the parties that we  
3 request in our questionnaire, parties will be much better able  
4 to make an educated decision as to whether they're better off  
5 settling before this Court determines the so-called common  
6 issues or after. So --

7 THE COURT: This is part of every bankruptcy case, and  
8 perhaps it's particularly true of this case given its size,  
9 complexity and the number of parties who are involved. We have  
10 an example of that very issue today on this morning's docket.  
11 A matter was settled as an uncontested matter as item number 6,  
12 and I'm about to issue a decision with respect to a contested  
13 matter which is appearing after we're done with all of the  
14 objections on this list.

15 Parties take their risks in the flow of a bankruptcy  
16 case and they take their risks in the flow of a mediation to  
17 make informed judgments as to whether it makes good sense  
18 economically to settle or to take your chances behind door  
19 number 3 or door number 601.

20 The ADR procedures do necessarily involve common  
21 issues, but just because those common issues are setoff,  
22 termination, valuation, computation of termination payments and  
23 notice, to list the items that are in the order, doesn't  
24 necessarily mean, by the way, that that's the only list of  
25 common issues, nor does it necessarily mean that, just because

1 that's an issue of law or fact to be determined, that it's the  
2 kind of thing that will be differently determined if it ends up  
3 in litigation. In fact, informed judgment would suggest that  
4 you settle something because you're reasonably confident that a  
5 thoughtful finder of fact and law will find it a certain way  
6 even if it's not the way you want it to be. And --

7 MR. BIENENSTOCK: That's my point, Your Honor, that  
8 you want to have that data that goes to those issues --

9 THE COURT: Necessarily that data will have to be in  
10 front of the parties to the mediation if they're going to reach  
11 an agreement, assuming they're represented by you.

12 Now, I don't know who's going to represent every  
13 counterparty. I don't know whether any of these issues in  
14 every -- are even pertinent to some of these disputes. Some of  
15 these disputes may simply be ornery obdurate behavior, the  
16 behavior of parties who need to pay, who want to hold onto  
17 their cash for as long as possible. Indeed, I suspect that  
18 that is the principal common issue of law or fact that unites  
19 all of these disputes.

20 Like every other bankruptcy case you've ever been in,  
21 when you owe money, hold onto it for as long as you can. It's  
22 better in your pocket than the debtor's. It's not written down  
23 anywhere, but that's how people behave. That's the behavior  
24 we're seeking to get to right now, to get to an ADR process  
25 that encourages parties to write checks, because the money's in

1 fact owed. And even if you can come up with some creative  
2 reasons as to why the number might be different, get to the  
3 table quickly.

4 So with that being what I consider the most important  
5 common issue, I think these ADR procedures are quite  
6 appropriately framed.

7 Now, as to the discovery issue which you mentioned, I  
8 believe the mediator is the best party to coordinate the  
9 sharing of information. And I see absolutely no reason why  
10 there need to be black-letter requirements for disclosure from  
11 the debtor, particularly in cases, and I'm not suggesting that  
12 this is true of any of your clients or, frankly, any other  
13 client represented in the room, but particularly in cases where  
14 the only issue is delay.

15 There really aren't any major issues of dispute. This  
16 is a process designed to facilitate the kind of settlement that  
17 was achieved in item number 6 on today's agenda. Nine-plus  
18 million dollars is being paid over to the estate that should  
19 have been paid a while ago. I think there are a lot of  
20 counterparties that should take heed, and they can save money  
21 ultimately by not participating in ADR but simply writing  
22 checks. I'm not suggesting, by the way, that anybody should do  
23 that in a situation in which there's a good-faith dispute.  
24 That dispute can be resolved in mediation; and if not, here;  
25 and if not here, some higher court.

1           So as to the discovery issue, I'm not moved by your  
2           argument. As to the confidentiality issue, I need to hear more  
3           from the committee.

4           MR. BIENENSTOCK: Thank you, Your Honor.

5           MR. COHEN: Your Honor, as to the confidentiality  
6           issue, the committee does not trade in derivatives; it's a  
7           statutory fiduciary. As such, it's involved in derivatives  
8           issues in these cases every day. The committee members  
9           themselves regularly recuse themselves, as appropriate, where  
10          they have a competitive interest in the matter at issue.

11          Further, the expectation is, with respect to those  
12          mediations where the committee actually does appear, it would  
13          be the committee's professionals rather than the actual  
14          members.

15          Finally, under section 10(b) of the proposed order,  
16          the mediator has the broadest possible discretion. In a  
17          certain situation, if a counterparty has an issue that it  
18          believes should be excluded from the presentation to the  
19          committee, it has the power to go to the mediator and ask for  
20          that relief. We think it would be inappropriate to give  
21          counterparties unilateral right to exclude the committee.

22          THE COURT: Thank you.

23          As to the confidentiality issue, I'm satisfied that  
24          the committee, for reasons just expressed, as an estate  
25          fiduciary, can be bound to confidentiality and in fact, in most

1 every case that I'm involved in, orders are entered at the  
2 outset of the case relating to the sharing of confidential  
3 information with the committee and between the committee and  
4 third parties, not only in this case but in virtually every  
5 other large Chapter 11 in this district.

6 I'm also persuaded that having the committee actively  
7 involved in this process, in a manner that I don't wish to  
8 circumscribe by words now but that I think needs to be adjusted  
9 on a case-by-case basis, will contribute to the fairness and  
10 overall efficiency of the process. So as to that concern, I  
11 overrule that objection.

12 As to the Article 3 issue, which is the first point  
13 I've already covered, but with the exception of making clear  
14 that Article 3 rights are preserved within the order, the  
15 objections of Royal Bank of Scotland are overruled.

16 The next is Highland Capital Management.

17 UNIDENTIFIED SPEAKER: Highland Capital Management.

18 THE COURT: Is anyone here for Highland?

19 If no one is here to press those objections, those  
20 objections are denied for failure to prosecute.

21 UNIDENTIFIED SPEAKER: Next one is EXCO, Your Honor,  
22 E-X-C-O.

23 EXCO?

24 THE COURT: EXCO Operating Company, LP?

25 No response. Denied for the same reason.

1           Now we get to omnibus objection of derivative  
2       counterparties.

3           UNIDENTIFIED SPEAKER: Yes, Mr. Szyfer.

4           MR. SZYFER: Thank you, Your Honor, and I'm mindful of  
5       what -- the comments that Your Honor just made, so I will keep  
6       my comments brief. I have a great deal of respect for Mr.  
7       Gruenberger, but with all due respect, I'm still a little  
8       skeptical on the information point. And if I can elaborate on  
9       an example, I have a client who, as Your Honor has said, has  
10      already paid the undisputed amount. We sent a 6(d) letter  
11      under the ISDA agreement and said that 5.2 million was due. We  
12      were told that that was not the right number, that their number  
13      was higher, but we paid the amount. And when I have asked for  
14      the information and said, well, let me find out what your  
15      numbers are and let me find out what the difference is. I  
16      haven't received that information.

17           And that's why I'm concerned, and that's why I would  
18      echo Mr. Bienenstock's concerns that there should be something  
19      in the order, whether it's that the mediator has the ability to  
20      grant this information or requiring that the debtors at least  
21      provide us with the terminated transaction detail that they  
22      wanted with respect to the derivative questionnaire so that at  
23      least we can have the same opportunity, as Mr. Gruenberger said  
24      at the last hearing, to scrub the number. That's really all  
25      we're looking for. And the earlier the debtors give that to

1 us, the more expeditious the process will be.

2 The debtors are going to give us one raw number  
3 pursuant to the derivatives ADR procedures; well, that's what  
4 they've done in my case. They've said our number is about  
5 750,000 dollars higher. So it's a small portfolio. But that  
6 being said, when I've asked to see where the differences are, I  
7 haven't received the same cooperation.

8 I've provided to the debtors voluntarily to help  
9 expedite the process to avoid having to mediate as many  
10 mediations as I think I'm going to have to participate in. But  
11 that being said, I haven't received the same cooperation, and  
12 that's really why I rise, that's why I'm skeptical and that's  
13 why I do want something in the order.

14 THE COURT: Mr. Gruenberger, you've been --

15 MR. GRUENBERGER: Your Honor --

16 THE COURT: -- you've been lauded for being someone  
17 that is greatly respected, but there's a huge "but" associated  
18 with it.

19 MR. GRUENBERGER: Yes, Rocky Marciano used to smile  
20 before the left hook also; I remember that well.

21 Mr. Szyfer never asked me for any information. He  
22 may -- his client may have asked the debtors in the pre-  
23 mediation world; I don't know. I assure you, if one of Mr.  
24 Szyfer's nineteen clients -- I think there are nineteen -- that  
25 he represents on this proceeding gets sent an ADR notice and

1       they say we don't have the information in good faith, they'll  
2       get it.

3               THE COURT: I'm confident that's true and recognize  
4       that that's an essential aspect of the process. To some  
5       extent, I gather that objections that have not gone away are  
6       durable in part because of some lack of trust that, if it isn't  
7       precisely written down in an order that everybody can look to,  
8       that the mediations will be one-sided or in some way biased.

9               I believe that virtually every order that I enter is  
10       imperfect in one way or another, largely because I enter so  
11       many, largely because even when a document is thoroughly and  
12       carefully lawyered there are opportunities for disagreement as  
13       to what is intended and because it is the nature of an  
14       adversary system to vigorously and zealously pursue claims and  
15       defenses in an atmosphere in which while we trust each other  
16       there is also a strong desire to win. And so if it is not  
17       precisely described, sometimes information is not shared,  
18       particularly the information that's embarrassing or that might  
19       not support a position.

20              That being said, I believe that it is important that  
21       the mediators be the parties who are most actively involved in  
22       managing this process and that we not attempt, by means of a  
23       requirement in an order, to impose disclosure or other  
24       obligations that frankly are a natural part of the give-and-  
25       take in the mediation itself.

1           To the extent that there is a 750,000 dollar delta  
2           between what has already been collected and what might be  
3           collected, provided the debtor were to provide information to  
4           support the higher number, I must say I'm surprised that there  
5           has been any delay in providing the information that would lead  
6           to the payment of the 750,000 dollars which is due and owing  
7           from an apparently solvent entity that might pay it.

8           So it's with that understanding that -- Gordon Gekko  
9           said it many years ago -- the natural desire of a debtor to  
10          collect as much money as it can collect will be the ultimate  
11          lubricant for this process. I believe that the debtor will  
12          provide information that supports its claims in good faith and  
13          that those in a position to respond will seek to contradict or  
14          supplement so as to make clear what the right amount is when  
15          there's an active dispute. And I leave it to the mediator to  
16          not only encourage compromise but to be a voice of reason in  
17          the discovery process.

18          So I see no reason to modify the order formally.

19          MR. GRUENBERGER: Thank you, Your Honor. I just would  
20          like to add a philosophical twist, if I might. One of the  
21          benefits of mediation, and there's no benefit in winning  
22          because nobody wins in mediation, the benefit to have  
23          principals present is for them to hear the other side. So if  
24          these side's principals hear the other sides', they come  
25          closer; it's inevitable.

1           And my clients are in the audience today. They've  
2           listened to what you've said. I hope the counterparties'  
3           principals are listening as well, because that's the only way  
4           it's going to work. Winning is not the game. And I agree with  
5           Your Honor. Thank you.

6           THE COURT: Okay.

7           So I've overruled that objection.

8           D.E. Shaw?

9           MR. ROSENTHAL: Good morning, Your Honor. My name is  
10          Jeff Rosenthal of Cleary Gottlieb Steen & Hamilton. I actually  
11          had not come here to argue on behalf of D.E. Shaw, but my  
12          associate, David Livshiz, had planned to. His Southern  
13          District admission was scheduled for this morning as well.  
14          He's admitted in New York State Court, and with the Court's  
15          indulgence I'd like to orally move that he be accepted pro hac  
16          to be able to make the argument for D.E. Shaw.

17          THE COURT: I accept that oral motion and welcome your  
18          colleague to the Southern District of New York.

19          MR. ROSENTHAL: Thank you. I do have one comment; if  
20          I could just do it out of turn on behalf of Wachovia, who I was  
21          here on behalf of. We do plan, in light of the comments the  
22          Court has made this morning, to withdraw the objection of  
23          Wachovia. Almost all of it had been resolved. There had been  
24          one minor clarification we had sought, but we do take the  
25          Court's statements to heart and do withdraw that, and we don't

1       need the time.

2               THE COURT: All right, fine. Thank you for that.

3               MR. LIFSHIZ: Thank you, Your Honor.

4               THE COURT: Just to be clear, you still have to be  
5 formally admitted, you understand that.

6               MR. LIFSHIZ: I am being admitted next Tuesday. Thank  
7 you, Your Honor. I'm here on behalf of D.E. Shaw Composite  
8 Portfolios and D.E. Shaw Oculus Portfolios and their respective  
9 affiliates.

10              I've listened very carefully what Your Honor has said  
11 today, especially on the sanctions issue which is the one  
12 narrow issue on which we have objected, and I rise only because  
13 I was here in August and I'm here today, and I've listened  
14 carefully, and I haven't heard anyone specifically mention the  
15 type of objection that we have. And in two rounds of Mr.  
16 Gruenberger's declarations, I have not seen a response  
17 specifically to our very narrow objection. And so I wanted to  
18 bring it to Your Honor's attention.

19              Our objection is extremely narrow. We are not  
20 objecting to having sanctions in the order. We understand why  
21 it's necessary, we understand Your Honor's explanation that  
22 having some skin at the line will help parties reach a process.  
23 Our objection is on the small point of who should drive the  
24 sanction process in the event that a party is not acting in  
25 good faith, and we believe -- and we're objecting to the order,

1 as drafted, because it allows the parties themselves to  
2 initiate the sanctions process, rather than a third-party  
3 mutual mediator, who's supposed to be there to promote  
4 compromise and which is what is provided for in the standing  
5 mediation order in this district, and which is the only thing  
6 that has been ordered in the two cases which the debtors have  
7 cited as precedent in this case. We think that allowing  
8 parties to push sanctions on the basis of a nebulous standard  
9 as good faith is simply an invitation for more litigation, not  
10 less litigation. And therefore, it would undermine the goals  
11 of efficiency that Your Honor has articulated today.

12 THE COURT: Mr. Gruenberger, do you have a response to  
13 that?

14 MR. GRUENBERGER: Yes, Your Honor. Good faith, like  
15 obscenity, you know it when you see it.

16 THE COURT: You got a delayed -- you got a delayed  
17 laugh.

18 MR. GRUENBERGER: I'd like to see the person who can  
19 write the encyclopedic definition of good faith in a meaningful  
20 way in under 4,000 pages. People know what good faith is.  
21 People know what bad faith is. We don't have to write a  
22 legislative embodiment. If you're in good faith, nothing's  
23 going to happen. But if you blow off the process, if you don't  
24 respond to an ADR notice, if you don't show up for a mediation,  
25 if you don't return a phone call, that's bad faith. Now, this

1 can happen even before a mediator gets involved. How does the  
2 Court know?

3 There's going to be no sanctions, as Your Honor has  
4 said and as the order, as proposed, states. There will be no  
5 sanctions unless there's a hearing on notice and Your Honor  
6 makes the decision. Whose to tell Your Honor that that's  
7 happened? The mediator might, if he's been involved, sure.  
8 But a lot of this can happen before the mediation.

9 So I don't think that the objection has any substance  
10 whatsoever and should be overruled.

11 THE COURT: I'm going to overrule the objection not  
12 necessarily because I'm equating good faith with obscenity,  
13 because I'm not, but because the only way that a motion for  
14 sanctions can be properly pressed, if it's going to have any  
15 reasonable prospect of succeeding, is if there are credible,  
16 demonstrable, pretty horrific facts that support the motion.  
17 Because it is clear to me that the goal of this ADR process,  
18 which has been crafted with considerable care by the debtor in  
19 cooperation with the creditors' committee and which currently  
20 reflects considerable compromise as a result of the various  
21 responses received from counterparties, is a process which is  
22 designed to work. As I said earlier today, there may be some  
23 imperfections; there always are in documents. But the spirit  
24 that underlies this effort is to get people to the table so  
25 they can talk to each other with the facilitation of an

1 independent, neutral party who will help to interpret what the  
2 parties are saying to each other. I don't pretend to know how  
3 each of these mediations will work, but I do know how mediation  
4 generally works, and I have, myself, served as a mediator from  
5 time to time. I agree with Mr. Gruenberger that you can tell  
6 when a party to a mediation is not acting in good faith. You  
7 can tell when a party to a mediation doesn't want to settle.  
8 Just because a party doesn't want to settle doesn't mean that  
9 it's sanctionable. In fact, it's clearly not sanctionable.  
10 This is a consensual process. But if a party is willful and  
11 obdurate, unwilling to participate, refuses to show up at a  
12 mediation, or acts like Serena Williams at the mediation, that  
13 might be sanctionable.

14 With apologies to Serena, the objection is overruled.

15 MR. GRUENBERGER: The next one is Taconic Capital  
16 Partners, LP. Taconic?

17 THE COURT: Taconic's objection is overruled for  
18 failure to prosecute Barclays Bank, PLC.

19 MR. LACY: Good morning, Your Honor. Robinson Lacy  
20 from Sullivan & Cromwell for Barclays Bank. My main reason for  
21 being here is to secure the right of noteholders of CDOs to  
22 participate in these mediations. The -- some background is  
23 required, although the Court is familiar with the basic  
24 structure. We're concerned about derivatives where Lehman's  
25 counterparty is a special-purpose entity, typically a Cayman

1 Island entity. All of the economic interest in that entity is  
2 held by noteholders, purchasers of notes issued by that entity.  
3 But the entity itself is the swap counterparty; it's the one  
4 that terminates or does not terminate the swap. There is  
5 normally an indentured trustee on the scene which holds most of  
6 the assets as collateral for the notes and has some  
7 responsibilities for making payments pursuant to the indenture.  
8 Okay? So we're talking about a situation where we have three  
9 players on the counterparty side: we have the issuer itself,  
10 which is a shell, typically, we have an indentured trustee,  
11 which is a bank, somewhere, with no money in the game, and we  
12 have the noteholders. Now, in general, in the deals I'm  
13 interested in, the noteholders I'm talking about are not people  
14 who bought a thousand dollars worth of something to put in an  
15 IRA. Barclays owns hundreds of millions of these notes. The  
16 notes are issued in classes, and it's normal for the indenture  
17 to provide that the senior class is the controlling class,  
18 meaning that the majority of the holders of that class can tell  
19 the trustee what to do under certain circumstances. There are  
20 a number of situations where Barclays owns a majority of the  
21 controlling class, so it single-handedly is in a position to  
22 tell the indenture what to do. And I am sure that there are  
23 many other similar structures where there is another noteholder  
24 that I don't know about who is also in a position to tell the  
25 indentured trustee what to do.

1           These big noteholders are, for all practical purposes,  
2           the principals, the business principals of the counterparty.  
3           And every argument that has been presented, all of which we  
4           subscribe to for why the principal should be in the room in a  
5           mediation, apply to these noteholders. There are going to be  
6           noteholders who are out of the money, who are not interested  
7           and shouldn't be there. But if a noteholder is big enough to  
8           be interested, to want to turn up, the noteholder should be  
9           allowed to turn up.

10           Now, I thought this would not be controversial. The  
11           debtors' omnibus response says on page 17, and I quote, "the  
12           participation of trustees, collateral agents, security  
13           holders" -- and I assume that means noteholders -- "or other  
14           parties that act on behalf of special-purpose entities are  
15           necessary and appropriate for meaningful mediation." We could  
16           not agree more. We could not agree more that the committee  
17           should be involved in these mediations because they have an  
18           economic interest in the outcome of these things. The revised  
19           order that was issued, I think, shortly after the last hearing  
20           modified the confidentiality provisions to allow the indentured  
21           trustees to tell the noteholders what had happened in the  
22           mediation but did not allow the noteholders into the room.

23           Remember that these procedures contemplate,  
24           essentially, two types of conversations. There is supposed to  
25           be an initial settlement conference by telephone, and then

1       there is supposed to be, if that doesn't work, some sort of a  
2       sit-down meeting, okay? And as this thing was drafted, the  
3       confidentiality provisions shut out of the room anyone other  
4       than the derivatives counterparty as defined, the Lehman  
5       entity. Now, the indentured trustee has been let in, but so  
6       far, there's a question about the noteholders. Just within the  
7       last week, I think it is, there is now a provision concerning  
8       an indentured trustee without authority, that is, a trustee  
9       that does not have authority to act on behalf of the  
10      noteholders, inviting the noteholders to participate. There's  
11      still no corresponding provision saying they can actually  
12      participate. But there is apparently, still, in Lehman's mind,  
13      a class of indentured trustees with authority. Now, one of the  
14      ways you get authority under this order is by soliciting  
15      instructions from noteholders.

16               And the Court should be aware that in some of these  
17      structures, a Lehman entity claims to be the controlling  
18      noteholder by reason of owning unfunded contingent-funding  
19      notes that were issued for the purpose of funding payments  
20      under swaps that have been terminated. So there is a Lehman  
21      entity out there on some of these deals that has no economic  
22      exposure on the CDO side, but which it claims, under the  
23      documents, is entitled to instruct the trustee and make that  
24      trustee a trustee with authority. It is obviously the  
25      perspective of the noteholders who have actually put money into

1 the deal that they're not content to be represented by that  
2 sort of a trustee. We would like to be in the room ourself.

3 I proposed to Mr. Gruenberger that we put in a few  
4 words that said -- well, you have to have some provision for  
5 telling the noteholders this is happening. That's pretty much  
6 been drafted already, but it only applies to the noteholders  
7 without -- the trustees without authority. So our proposal is  
8 that just as the trustees without authority are now required to  
9 notify the noteholders and invite them to participate, all  
10 indentured trustees should be required to go through that  
11 process -- doesn't require any additional drafting -- and then  
12 there should simply be a provision saying any noteholder is  
13 permitted but not required to participate as if it were a  
14 party. Should be able to be on the telephone calls, should be  
15 able to be in the meeting, and this is simply to make sure that  
16 the actual economic interest in the CDO is heard when you try  
17 to negotiate the settlement.

18 There are two other smaller points. The first is that  
19 in the process of negotiating out the objections for the  
20 indentured trustees, the proposed order now has a dual set of  
21 deadlines which we submit are unworkable and prejudicial to  
22 noteholders. If one of the commencing documents, I guess it's  
23 called a notice, is served on the issuer and the indentured  
24 trustee -- and they're required to be served on both -- of one  
25 of these vehicles, then the issuer is required to respond in

1 thirty days, the indentured trustee is not required to respond  
2 for forty-five days, and the process for giving notice to the  
3 noteholders won't necessarily have played out even at that  
4 point. So you may have the issuer putting in a response which  
5 will affect the right of the noteholders before the noteholders  
6 are on the scene and before the indentured trustee is  
7 participating. And then, in the what have become very  
8 complicated provisions regarding the scheduling of the initial  
9 telephone call, the initial settlement conference, it's now set  
10 up so that a party other than an indentured trustee will get  
11 through that process in no more than twenty-four business days.  
12 But if it is an indentured trustee asking for a settlement  
13 conference, it can take -- it can actually take forty business  
14 days, eight weeks, before you actually get to the conference.  
15 It makes no sense to have these separate schedules; presumably,  
16 there should be one conference involving everybody, and it  
17 shouldn't happen until after the noteholders have had a chance  
18 to get there. I think the simple thing is these are big deals.  
19 If there's an indentured trustee on the scene, there's a lot of  
20 money at stake; the issues are complicated. You should just  
21 take the indentured trustee schedule and apply it to everybody  
22 for those.

23 The final point is a simple one. The general order  
24 that now applies to mediations in this district says that a  
25 Court can send something to mediation any time, but if a party

1 wants to make a motion to send something to mediation, which is  
2 how the party invokes the procedure, it has to be made promptly  
3 after the filing of the first piece of paper in the contested  
4 matter or adversary proceeding. The entire motion is  
5 presenting mediation as an alternative to litigation, and of  
6 course, that's what it's supposed to be. One of the  
7 innovations that Barclays agrees with is that the order makes  
8 clear that a mediation can be commenced before there is any  
9 litigation pending, before any motion has been made or before  
10 any complaint has been filed, and that should allow plenty of  
11 time for this process. Barclays objects, however, to the  
12 change in the existing procedures that is accomplished by the  
13 proposed order that it now allows the debtors to start this  
14 process at any time during the pendency of an adversary  
15 proceeding. Our suggestion is that they should be subject to  
16 essentially the same deadline that applies now, that is, no  
17 later than shortly after the filing of the initial paper  
18 starting litigation.

19 As you've just heard from the schedule, these  
20 mediations can take a while. Our experience is it's  
21 extraordinarily difficult for the Court to be called upon to  
22 actually make substantive decisions or try cases in the middle  
23 of a mediation. So either the mediations started late in the  
24 case will be pointless or they will delay the case, and neither  
25 is a satisfactory outcome. There is no good reason for not

1 requiring that any mediation be begun prior to the commencement  
2 of litigation or immediately after the commencement of  
3 litigation, and we'd like to see the order modified to  
4 accomplish that.

5 THE COURT: So you're looking for a sunset date with  
6 respect to the effectiveness of the order?

7 MR. LACY: Not with respect to the order.

8 THE COURT: In terms of -- as it applies to a  
9 mediation in any particular dispute.

10 MR. LACY: The idea is that this -- of course, the  
11 Court can send something to mediation. The precise thing that  
12 I proposed to Mr. Gruenberger is that if someone wants to start  
13 a mediation after the deadline set out in the general order,  
14 which is immediately after the commencement of the formal  
15 litigation, that person should have to apply to the Court to  
16 get permission to start.

17 THE COURT: Well, maybe I'm missing something, and  
18 it's your last point of a number of points.

19 MR. LACY: That's the last point.

20 THE COURT: So let me just react to the last point,  
21 and then give Mr. Gruenberger an opportunity. My notion as to  
22 how these procedures are intended to work is that, largely,  
23 they will be deployed prior to the commencement of any  
24 adversary proceeding and that an adversary proceeding will be  
25 the default mechanism of a failed mediation process. That

1 doesn't necessarily mean that after an adversary proceeding has  
2 been commenced, that a return to mediation might not be  
3 possible. Nor does it mean, necessarily, that as to certain  
4 disputes that may not be subject to ADR, once an adversary  
5 proceeding has been commenced, at some point in that process,  
6 mediation may turn out to be desirable, either pursuant to  
7 M-143, pursuant to this order, or pursuant to an order that's  
8 crafted for the particular dispute before me.

9 I don't understand why you're concerned about this.  
10 Are you concerned that at some point we get deeply into an  
11 adversary proceeding and you're concerned about delay with  
12 respect to that adversary proceeding?

13 MR. LACY: Both delay and some informal discovery  
14 requiring us to disclose our litigation strategy. Yes, Your  
15 Honor. If we get to the eve of trial, under these procedures,  
16 unlike the general order, the debtor has complete discretion to  
17 start one of these proceedings. And we would prefer not to  
18 have it in the arsenal of the people we are litigating against  
19 to force us into a meeting where we had a discussion concerning  
20 our views of the case shortly before we're preparing for trial,  
21 both because that's unfair, and also because it is likely to  
22 delay the disposition of the case.

23 THE COURT: Okay, I understand your position on that.  
24 Mr. Gruenberger, what do you say about all this?

25 MR. GRUENBERGER: Mr. Lacy did indeed make proposals

1 to me under Federal Rule of Evidence 408, so I wasn't going to  
2 comment about our discussions. But since he has chosen to  
3 breach 408, I will respond. Let's take the last point.

4 THE COURT: Well, this isn't evidence. We're just  
5 having an argument. We're just having an argument in which I'm  
6 trying to get through a long list of objections, and this is  
7 not the last one.

8 MR. GRUENBERGER: I'll take his last point, first,  
9 Your Honor, and I appreciate the caution.

10 143, M-143, the standing mediation order, which Mr.  
11 Lacy uses when he likes it but doesn't use it when he doesn't  
12 like it, provides a procedure in itself, paragraph 3.6, that  
13 says if a party wants out of a mediation because it's  
14 inappropriate for any reason for cause shown, he shall make an  
15 application to get out of it. Again, you heard the presumption  
16 that we're going to do something in bad faith in the middle of  
17 a case, like Ballyrock, which Mr. Lacy's client is a party in,  
18 and therefore, either delay it or use mischief on discovery.  
19 That should not control this, Your Honor. 143 gives a way to  
20 get out. We shouldn't have another gate-keeping barrier to  
21 starting a mediation.

22 However, and I think Your Honor answered that question  
23 appropriately, and I'll move on to his other two points. On  
24 September 2nd, which is almost two weeks ago, we resolved, with  
25 the indentured trustees, that Mr. Lacy talks about. We

1 incorporated a new provision, 5B, into the order. It's on page  
2 5 and 6. And there it said if an indentured trustee receives  
3 an ADR notice, the debtors and that trustee sit down and look  
4 at the governing documents. If the indentured trustee has  
5 authority to participate and settle on behalf of noteholders,  
6 then we go forward. If, however, there is no authority through  
7 those documents, then the indentured trustee has some  
8 obligations to perform in good faith, and that's to advise all  
9 those holders of the dispute, advise them that we have this ADR  
10 notice, invites them to participate in the procedures as an  
11 alternative to litigation, and encourages them to communicate  
12 with the debtors, and offers to take the noteholders' direction  
13 in terms of participation and settlement.

14 I don't know what more noteholders could get than  
15 that. The indentured trustees -- you've heard this many  
16 times and in many different contexts, already -- have  
17 responsibilities. We try to meet those concerns and those  
18 responsibilities to get the noteholders in, and they are in.  
19 There's nothing more we can do with respect to that,  
20 whatsoever, Your Honor.

21 In terms of the time periods, this is another case of  
22 no good deed goes unpunished. So we doubled all the time  
23 periods for everybody, and gave the indentured trustees extra  
24 time so they could do this communications with the noteholders  
25 to protect the trustees and the noteholders. That's not good

1 enough. Again, some noteholders seem to want more. We'll be  
2 into next July before we can even start a mediation if we keep  
3 extending these deadlines. Everyone of these deadlines was  
4 increased at the request of people. We can't go further  
5 because it won't work.

6 And I have nothing more to say about Mr. Lacy's  
7 objections.

8 MR. LACY: May I reply, very briefly, Your Honor?

9 THE COURT: Yes, very briefly.

10 MR. LACY: On the last point, the proposal I made  
11 concerning the timetable would not extend the mediation process  
12 at all. I'm simply saying that the issuer would have the same  
13 amount that they have already given to the indentured trustee  
14 to respond to the ADR notice. So it's not as if they're going  
15 to go ahead and do this mediation or get it down immediately  
16 after the issuer turns in his thirty-day response. They're  
17 obviously going to wait the forty-five days for the indentured  
18 trustee. Why not give the issuer the same forty-five days?  
19 They can't do anything in the meantime. I'm not proposing any  
20 delay at all.

21 And on the first point, all we're asking for is that  
22 the noteholders get the same treatment for -- when there is an  
23 indentured trustee with authority -- that they have provided  
24 when the indentured trustee lacks authority. Because whatever  
25 the legal documents say, the indentured trustees are the

1 principal. They are the ones with the economic interest. It  
2 is Mr. Gruenberger's assertion --

3 THE COURT: You don't -- you mean the noteholders are  
4 the parties with the economic interest.

5 MR. LACY: I'm sorry, what did I say?

6 THE COURT: You said the indentured trustees.

7 MR. LACY: I'm sorry, the noteholders, that's correct,  
8 are the parties with the economic interest.

9 THE COURT: Are you just seeing if I'm listening after  
10 the --

11 MR. LACY: I have to say, you're more alert than I am,  
12 Your Honor.

13 THE COURT: All right.

14 MR. LACY: The provision that Mr. Gruenberger just  
15 told you about only applies -- and we're completely happy with  
16 this procedure -- but it only applies to an indentured trustee  
17 that lacks authority. There is no good reason not to make the  
18 same procedure apply to an indentured trustee that has  
19 authority to ensure that the noteholders with the real economic  
20 interest are in the room.

21 MR. GRUENBERGER: There is a very good reason, Your  
22 Honor, and this is what it is. Their authority was given by  
23 the noteholders to the trustee that says trustee, I trust you.  
24 You do the job for me. You're getting paid for this, you're  
25 careful, I trust you. Now, we're going to have that trustee

1 have to battle his own noteholders in the same proceeding  
2 because they're in there, too, second-guessing, creating who  
3 knows what kind of at least noise, time, effort, and maybe  
4 chaos. What does authority mean? It's meaningless when they  
5 have to attend to piling it on the debtors. I think that's the  
6 only answer that counts.

7 THE COURT: But what I'm hearing may be chaos because,  
8 if I understand what Mr. Lacy is saying on behalf of his  
9 nonclients, the noteholders, because he represents Barclays  
10 Bank, PLC, but he's here saying we're concerned in our capacity  
11 as indentured trustee in a variety of transactions -- is that  
12 right?

13 MR. LACY: Your Honor, Barclays Bank is a noteholder.  
14 I'm here on behalf of a noteholder.

15 THE COURT: But are you also concerned about Barclays  
16 in respect of any other --

17 MR. LACY: No, Barclays is not, as far as I know, an  
18 indentured trustee.

19 THE COURT: Okay.

20 MR. LACY: We're here entirely on behalf of  
21 noteholders.

22 THE COURT: But you're speaking only as Barclays may  
23 represent the interest of other noteholders, or are you  
24 speaking about Barclays? Because obviously you know what --

25 MR. LACY: No, I'm speaking about Barclays. I want

1 Barclays to be in the room for the mediations affecting its  
2 CDOs.

3 THE COURT: Okay. I misunderstood. I thought you  
4 were speaking on behalf of Barclays but also speaking about a  
5 class of undefined noteholders in different transactions.

6 MR. LACY: Barclays owns hundreds of millions of  
7 dollars of notes issued by CDOs that are counterparties to  
8 derivatives with Lehman. Barclays feels, like any principal,  
9 that if its money is being talked about, it would like a chance  
10 to participate in the process.

11 THE COURT: What does that have to do with this order,  
12 though? I mean, if you -- if you send a letter to debtors'  
13 counsel and say listen, we have major economic interests here,  
14 and we want to be heard in any mediation that involves the  
15 following CDOs --

16 MR. LACY: Um-hum.

17 THE COURT: -- whatever they may be, so if there's a  
18 mediation, we want to be in the room, just like the creditors'  
19 committee, and we'll sign confidentiality agreements if that's  
20 necessary, I suppose there are two responses to that. One is,  
21 come on in. The other is, you're just a lot of noise; you have  
22 no legal right to be here. I'm not sure what the answer's  
23 going to be. But presumably, if the debtor is motivated to  
24 have a process that leads to a yes, as opposed to a no at the  
25 end of the mediation, they're going to want a party that has a

1 significant influence over the outcome, or perhaps the ability  
2 to bind a trustee, to be in the room. Correct?

3 MR. LACY: At the moment, the confidentiality  
4 provisions of the order prohibit anyone -- would prohibit the  
5 noteholders from being in the room. Are you saying that we  
6 should just count on the debtors to waive that?

7 THE COURT: No, I'm suggesting that, first of all, you  
8 are objection L in a list of objections that started with A,  
9 and it's just about noon time.

10 MR. LACY: Your Honor, I will sit down.

11 THE COURT: No, I'm not asking you to sit down. I'm  
12 just trying to understand the issue that's before me right now  
13 and why you're pressing this hard, and why the debtor is  
14 pressing hard against you. The idea is for the ADR procedures  
15 that we're adopting to be productive and workable. The number  
16 of objections that this proposal produced suggests that this is  
17 a subject as to which reasonable people may differ, have  
18 differed. We're now down to a fairly narrow issue that  
19 particularly affects your client, but also others similarly  
20 situated to your client, i.e., noteholders in CDOs that are  
21 either known or unknown. You happen to be a known noteholder.

22 MR. LACY: Um-hum.

23 THE COURT: I don't know, for purposes of whatever the  
24 dispute may be that is the subject of an ADR request in the  
25 future, whether or not it is desirable or undesirable for you

1 or people like you to be in the room. I just don't know. I  
2 assume that it would be desirable, if you have hundreds of  
3 millions of dollars worth of notes and are in a position in  
4 various structures to direct activity, and that presumably, if  
5 it gets in the way of progress for you to not be in the room,  
6 you'll be invited in, and if it gets in the way of progress for  
7 you to be in the room and to make noise, you won't be invited  
8 in. I'm just assuming that. Mr. Gruenberger, do I understand  
9 this or don't I?

10 MR. GRUENBERGER: I think you do very well, Your  
11 Honor. I'm not predicting, yes or no, whether there will be  
12 noise. I just posited a situation where there could be noise.  
13 And I'm not asking that Mr. Lacy's client fire all their  
14 trustees, either, in order to get into the room. I'm not  
15 suggesting that at all. But let's see what happens when the  
16 trustee with authority responds to an ADR notice and what  
17 happens if Mr. Lacy does, in fact, take up Your Honor's  
18 suggestion to notify us, saying they would like to attend. I'm  
19 not an unreasonable person, as a lawyer, and I don't think my  
20 client --

21 THE COURT: None of the --

22 MR. GRUENBERGER: -- will be unreasonable, either.

23 THE COURT: And --

24 MR. GRUENBERGER: Or as a person.

25 THE COURT: This is a federal court you're saying this

1 in, you realize that? Okay, and I think it's true that most of  
2 us view ourselves as being not unreasonable. I'm going to  
3 overrule the objection of Barclays Bank with the observation  
4 that this is less about whether or not particular language ends  
5 up in the current iteration of this order, and more about  
6 getting the attention of the right people who need to  
7 participate in the process and make decisions that are well-  
8 informed and that are designed to efficiently dispose of  
9 disputes prior to litigation. I hope that these procedures  
10 will be interpreted in that spirit and because I know that  
11 these transcripts are carefully reviewed after the fact for  
12 hidden meaning, let me be clear that there's no hidden meaning  
13 in this comment, that I expect that the procedures will be  
14 applied in a manner designed to expedite and facilitate the  
15 resolution of disputes in good faith and that parties will not  
16 be kept away arbitrarily if their involvement may facilitate  
17 such positive outcomes.

18 By the same token, this is not a free-for-all. And  
19 the structures about which we are now making room in the order  
20 and trying to accommodate are, themselves, extraordinarily  
21 complex. And I'm unable to tell you now whether or not the CDO  
22 indentures are all cut from the same cloth or cut from  
23 different cloth. And to the extent that these are different  
24 complex highly-structured vehicles, I think it is really not a  
25 good idea to try to pick arbitrary deadlines or parties for

1 purposes of an efficient process. Once again, I think this is  
2 a matter that can be left to the informed discretion of the  
3 mediator once the mediator has a dispute before him and her.

4 In that spirit, I overrule the Barclays Bank  
5 objection.

6 M is a limited objection of CIBC and Societe Genera --

7 MR. GRUENBERGER: Societe Generale and CIBC together.

8 MR. TREHAN: Good afternoon, Your Honor. Amit Trehan,  
9 Mayer Brown LLP, for Societe Generale and certain of its  
10 affiliates, CIBC and certain of its affiliates. We'd like to  
11 clarify that the objection, our objection, was previously fully  
12 withdrawn with respect to certain affiliates thanks to the  
13 communicative and open efforts of the debtors and we take your  
14 comments fully to heart and would withdraw the objection with  
15 respect to the remaining objectors as part of our objection.

16 THE COURT: Okay.

17 MR. TREHAN: Thank you.

18 THE COURT: Fine, thank you. Next is N, objection of  
19 Lai Mei Chan and others.

20 MR. GRUENBERGER: These are the Wong mini-bonds  
21 plaintiff, Your Honor.

22 THE COURT: Is there anyone here on behalf of that  
23 purported class of plaintiffs? Apparently not; that objection  
24 is denied for failure to prosecute.

25 MR. GRUENBERGER: Compass Bank.

1 THE COURT: Again, I hear no comment on behalf of  
2 Compass. That objection is overruled for failure to prosecute.  
3 And we're down to --

4 MR. GRUENBERGER: There are none left, Your Honor.

5 THE COURT: -- we're down to P, which was already  
6 dealt with. And so we've gotten through the list and I'm  
7 prepared to enter the order.

8 MR. GRUENBERGER: Your Honor, I'd like to hand up the  
9 order. There is one matter, however, that we have not yet been  
10 able to fill in, and that is the identity of the mediators.  
11 And it is still blank in paragraph 10, and I will hand up the  
12 order. And whatever Your Honor wishes to do in that regard in  
13 communicating with us the identities is fine. But, I leave  
14 that to Your Honor.

15 THE COURT: All right, thank you.

16 MR. GRUENBERGER: May I approach?

17 THE COURT: Please approach.

18 MR. GRUENBERGER: This is an unblacklined version,  
19 Your Honor.

20 THE COURT: It's an unblacklined version of a document  
21 that doesn't have a disc attached to it, so it's of no use.

22 MR. GRUENBERGER: We have a disc, Your Honor.

23 THE COURT: Okay, fine. All right, it's ten after 12,  
24 and I have indicated my intention to enter the alternative  
25 dispute resolution procedures order substantially in the form

1       that it has been presented and will make some judgments as to  
2       the identity of the mediators in consultation with counsel for  
3       the debtors and for the creditors' committee who have been so  
4       active in developing these procedures.

5               I recognize that a lot of people who are in court at  
6       this moment are here for the ADR procedures, and I'm going to  
7       give people who want to leave an opportunity to leave. I'm  
8       also going to give everybody an opportunity for a break. But  
9       because of the congestion of this docket, I think I'm going to  
10      go until 1 o'clock. So let's take a break for ten minutes, and  
11      then resume, and then go until 1 o'clock and then break for  
12      lunch. We're adjourned until then.

13             MR. GRUENBERGER: Thank you, Your Honor.

14             (Recess from 12:12 p.m. to 12:28 p.m.)

15             THE COURT: Be seated please. Number 11, Metavante.

16             MR. SLACK: Your Honor, Richard Slack from Weil,  
17      Gotshal for the debtors. We're here on the debtors' motion to  
18      compel performance of Metavante Corporation. As Your Honor  
19      knows, two months ago we had argument, after fully briefing the  
20      issue. Your Honor is in receipt of letters from both  
21      Metavante's counsel and from the debtors, which I think  
22      provides the status of where we are in terms of discussions,  
23      which is, essentially, that the parties have not had  
24      substantial discussions, as the letters which are docketed  
25      state.

1           The debtors were requested to make a proposal to  
2     resolve it, which we did. We have not received a proposal from  
3     Metavante in the two months since the hearing, and Metavante  
4     has not responded to our proposal that we've made.

5           Your Honor has mentioned Metavante a couple of times  
6     today, and so Your Honor may have a plan for the conference,  
7     but it is the debtors' position that this matter should be  
8     considered and decided, at the Court's discretion, obviously.

9           THE COURT: Understood. I'm ready to rule today.

10          MR. ARNOLD: May it please the Court, mindful of that  
11     comment, I want you to know why we wrote the letter, so that  
12     you have in mind that parties do take into account the risks of  
13     not settling, and you were quite clear at the hearing on July  
14     14th that there was an opportunity for the parties to consider  
15     resolving this matter.

16          For the Court's information, neither Lehman nor its  
17     counsel have been obdurate, ornery, or in any fashion  
18     unprofessional. Our dealings have been quite, to the contrary,  
19     exceptional throughout the history of our relationships. I  
20     reached out to counsel for the debtors to explain how it is  
21     that an impending transaction which will close on October 1st  
22     would, in my judgment, have a favorable impact on the  
23     likelihood of this matter resolving consensually. That was the  
24     singular purpose for us writing the letter to the Court. We  
25     are not here today to reargue the motion. The Court heard

1 extensive oral argument. It has been well briefed. The issues  
2 have come up again in, frankly, in other instances and motions  
3 and adversary proceedings. I wanted the Court to know that it  
4 was not by design, neglect or deliberately ignoring your  
5 comments on July 14th that the settlement has not proceeded  
6 further than it has. About a week ago we received a settlement  
7 proposal. I am authorized to state by both Fidelity and  
8 Metavante that post-closing of the merged entity we expect to,  
9 and intend to, and will make a settlement proposal, but we're  
10 also mindful that it hasn't been settled, and if it is the  
11 Court's desire to rule on the matter today, we govern ourselves  
12 accordingly. I just wanted the Court to know what I've done  
13 since July 14th to try to move this matter on.

14 THE COURT: Okay. Thank you for that update.

15 MR. ARNOLD: Thank you, Your Honor.

16 THE COURT: The Metavante matter consumed the better  
17 part of an afternoon's oral argument. My best recollection is  
18 that we specially listed it on the afternoon before the July  
19 omnibus hearing. Candidly, I don't recall why it was specially  
20 listed all by itself, but it's just as well that it happened,  
21 because it took a lot of time.

22 It's correct that I encouraged the parties to attempt  
23 to resolve this consensually, and I appreciate the fact that  
24 large enterprises, particularly those that are involved in  
25 major transactions in which acquisitions are literally weeks

1 away from being consummated, may be distracted or may have  
2 other priorities. But I also believe that when I suggested  
3 that this be listed for the September 15th omnibus hearing it  
4 was with the notion that, in effect, time would be up.

5 I'm also mindful of the fact that on today's calendar  
6 a matter very similar to this, item 6, has been consensually  
7 resolved, involving the payment of fifty percent more dollars  
8 to the debtors than are at issue in this current dispute.

9 I am prepared to rule and will do so now. Recognize  
10 that what I'm about to do will take some time and will probably  
11 take us to the lunch hour. If there is anyone here who doesn't  
12 want to hear the ruling in this case I'd like you to be free to  
13 both leave, because I won't be offended, or, if at some point  
14 during my rendition of this ruling you say to yourself this is  
15 something I don't need to hear, you're also free to leave at  
16 that point.

17 LBSF requests that the Court compel Metavante to  
18 perform its obligations under that certain 1992 ISDA Master  
19 Agreement dated as of November 20, 2007, defined as the "Master  
20 Agreement". And that certain trade confirmation dated December  
21 4, 2007, defined as the "Confirmation", and together with the  
22 Master Agreement, the "Agreement".

23 The Master Agreement provides the basic terms of the  
24 parties' contractual relationship and contemplates being  
25 supplemented by trade confirmations that provide the economic

1 terms of the specific transactions agreed to by the parties.

2 Under the Master Agreement, Metavante and LBSF entered into an  
3 interest rate swap transaction, the terms of which were  
4 documented pursuant to the Confirmation.

5 LBHI is a credit support provider for LBSF's payment  
6 obligations under the Agreement.

7 Due to declining interest rates the value of LBSF's  
8 position under the Agreement has increased. As of May 2009,  
9 under the payment terms of the Agreement, Metavante owed LBSF  
10 in excess of 6 million dollars, representing quarterly payments  
11 due November, 2008, February, 2009 and May, 2009, plus default  
12 interest in excess of 300,000 dollars.

13 It is possible that due to current market conditions  
14 and to the quarterly payment schedule prescribed by the  
15 Agreement the amounts that Metavante owes to LBSF as of today  
16 are even higher than those stated in the motion. Metavante has  
17 refused to make any payments to LBSF. In fact, it has refused  
18 to perform its obligations under the Agreement, as of November  
19 3, 2008. Instead, Metavante claims that LBSF and LBHI, via the  
20 filing of their respective Chapter 11 cases, each caused an  
21 event of default under the Agreement.

22 Metavante argues that due to such events of default it  
23 has the right, but not the obligation, under the safe harbor  
24 provisions of the Bankruptcy Code, to terminate all outstanding  
25 derivative transactions under the Agreement. Metavante also

1 maintains that it is not otherwise required to perform under  
2 the Agreement.

3 The parties presented their arguments to the Court at  
4 a hearing held on July 14, 2009. Notably at the hearing  
5 counsel to Metavante stated that, quote, "the opportunity to  
6 settle the matter", is a possibility. The reference in the  
7 transcript is page 58, lines 18 to 19. The Court took the  
8 matter under advisement and suggested that it be calendared for  
9 the September 15, 2009 omnibus hearing for purposes of either a  
10 bench ruling or a status conference on any progress the parties  
11 may have made towards a resolution.

12 I want to make clear that I am proceeding with this  
13 ruling because I view the letter described by counsel for  
14 Metavante, which talked about a possible settlement  
15 counterproposal occurring sometime after the closing of a  
16 merger on October 1, as being an insufficient commitment to a  
17 timely settlement.

18 On September 14, 2009 the Court received letters from  
19 counsel to each of the parties. Counsel to Metavante requests  
20 an adjournment to October 14. Counsel states that an  
21 adjournment will facilitate the parties' settlement  
22 negotiations but explains that Metavante may not make a  
23 counterproposal to LBSF's September 5, 2009 settlement proposal  
24 until after the proposed October 1, 2009 closing of a merger.  
25 Counsel also suggests that an adjournment will allow the Court

1 to put the motion on the same track as two other motions  
2 currently pending before the Court. Which motions, counsel  
3 claims, raise similar issues to the motion? Counsel to LBSF  
4 and LBHI maintain that inasmuch as Metavante has done nothing  
5 since July 14, 2009 to settle this matter other than asking  
6 LBSF and LBHI to make a settlement proposal, the parties are no  
7 closer to settlement than they were at the hearing, and,  
8 therefore, the status conference should go forward as planned.

9 While each of the matters reference by counsel to  
10 Metavante may have overlapping issues with those presented in  
11 the current dispute, each matter involves its own distinct set  
12 of facts. Moreover, each of the two referenced matters is in  
13 its infancy. No response has been filed in either one, which  
14 may further delay resolution here.

15 This is a dispute that has been fully briefed and  
16 argued and is ripe for determination. Moreover, I note that  
17 the settlement that was achieved with MEG Energy that was  
18 referenced this morning indicates that parties who are willing  
19 to settle can, and do.

20 Under the Agreement LBSF is obligated to pay the  
21 floating three month USD LIBOR BBA interest rate on a notional  
22 amount of 600 million dollars, which notional amount declines  
23 over time, beginning in May, 2010. Metavante, in turn, is  
24 obligated to pay a fixed interest rate, 3.865 percent, on the  
25 notional amount. The Agreement is set to expire on February 1,

1     2012. The Agreement defines event of default to include the  
2     bankruptcy of any party or credit support provider. Under the  
3     terms of the Agreement, upon an event of default the non-  
4     defaulting party may designate an early termination date. Upon  
5     termination a final payment is calculated and paid in order to  
6     put the parties into the same economic position as if the  
7     termination had not occurred.

8             In the instant case Metavante has refused to perform  
9     under the Agreement on account of the event of default that has  
10    occurred, and is continuing, on account of the bankruptcies of  
11    LBSF and LBHI. Metavante has not, however, attempted to  
12    terminate the Agreement. Instead, Metavante entered into a  
13    replacement hedge covering the period from November 3, 2008  
14    through February 1, 2010.

15            LBSF and LBHI argue that the Agreement is an executory  
16    contract because material performance, specifically payment  
17    obligations, remain due by both LBSF and Metavante. Under  
18    Bankruptcy Code Section 365(a) a debtor in possession may,  
19    "subject to the court's approval, assume or reject any  
20    executory contract". The case law makes clear, however, that  
21    while a debtor determines whether to assume or reject an  
22    executory contract the counterparty to such contract must  
23    continue to perform.

24            LBSF and LBHI further argue that the safe harbor  
25    provisions do not excuse Metavante's failure to perform.

1 Indeed, the safe harbor provisions permit qualifying non-debtor  
2 counterparties to derivative contracts to exercise certain  
3 limited contractual rights triggered by, among other things, a  
4 Chapter 11 filing. They're available, however, only to the  
5 extent that a counterparty seeks to one, liquidate, terminate  
6 or accelerate its contracts or two, net out its positions. All  
7 other uses of ipso facto provisions remain unenforceable under  
8 the Bankruptcy Code.

9 Notably, Metavante does not dispute that it has failed  
10 to perform under the Agreement. Instead, Metavante argues that  
11 the occurrence of an event of default under the Agreement gives  
12 rise to its right, as the non-defaulting party, to terminate  
13 under the safe harbor provisions. According to Metavante the  
14 occurrence of an event of default does not, however, create the  
15 obligation for it to terminate under the safe harbor  
16 provisions. Metavante emphasizes the term, quote, "condition  
17 precedent" set forth in Sections 2(a), 1 and 3 of the  
18 Agreement, which subject payment obligations to the condition  
19 precedent that no event of default with respect to the party  
20 has occurred and is continuing.

21 Metavante argues that under New York State contract  
22 law a failure of a condition precedent excuses a party's  
23 obligation to perform. Metavante states that its unequivocal  
24 right to suspend payments until the termination of the  
25 Agreement is fundamental to the manner in which swap parties

1 government themselves. Metavante takes issue with LBSF and  
2 LBHI in asking the Court to treat the Agreement like a garden  
3 variety executory contract, arguing that it cannot be compelled  
4 to pay because LBSF and LBHI cannot provide the essential item  
5 of value Metavante bargained for, namely an effective  
6 counterparty.

7 Metavante further argues on information and belief  
8 that LBSF and LBHI also are in default under certain  
9 unspecified indebtedness that allegedly may have created a  
10 cross default under the Agreement, asserting, as a result, an  
11 alleged need to engage in the discovery process.

12 It is clear that the filing of bankruptcy petitions by  
13 LBHI and LBSF constitute events of default under the Agreement.  
14 Specifically, Section 5(a)(vii) of the Agreement provides that  
15 it shall constitute an event of default should a party to the  
16 Agreement or any credit support provider of such party  
17 institute a proceeding seeking a judgment of insolvency or  
18 bankruptcy, or any other relief under any bankruptcy insolvency  
19 law or similar law affecting creditors' rights.

20 Section 2(a)(i) and 3 of the Agreement, in turn,  
21 subject payment obligations to the condition precedent that no  
22 event of default with respect to the other party has occurred  
23 and is continuing. It is also clear, however, that the safe  
24 harbor provisions, primarily Bankruptcy Code Sections 560 and  
25 561, protect a non-defaulting swap counterparty's contractual

1 rights solely to liquidate, terminate or accelerate one or more  
2 swap agreements because of a condition of the kind specified in  
3 Section 365(e)(1), or to "offset or net out any termination  
4 values or payment amounts arising under or in connection with  
5 the termination, liquidation or acceleration of one or more  
6 swap agreements". That language comes from Section 560.

7 In the instant matter Metavante has attempted neither  
8 to liquidate, terminate or accelerate the Agreement, nor to  
9 offset or net out its position as a result of the events of  
10 default caused by the filing of bankruptcy petitions by LBHI  
11 and LBSF. Metavante simply is withholding performance, relying  
12 on the conditions precedent language in Sections 2(a)(i) and  
13 (iii) under the Agreement.

14 The question presented in this matter and the issue  
15 that was argued by the parties at the hearing is whether  
16 Metavante's withholding of performance is permitted, either  
17 under the safe harbor provisions or under terms of the  
18 Agreement itself. It is not.

19 Although complicated at its core the Agreement is, in  
20 fact, a garden variety executory contract, one for which there  
21 remains something still to be done on both sides. Each party  
22 to the Agreement still is obligated to make quarterly payments  
23 based on a floating or fixed interest rate of a notional  
24 amount, it being understood that the net obligor actually makes  
25 a payment after the parties respective positions are calculated

1 on a quarterly basis, in February, May, August and November of  
2 each calendar year.

3 Under relevant case law it is clear that while an un-  
4 assumed executory contract is not enforceable against a debtor,  
5 see *NLRB v. Bildisco & Bildisco*, 465 US 513 at 531, such a  
6 contract is enforceable by a debtor against the counterparty.  
7 See *McLean Industries, Inc. v. Medical Laboratory Automation,*  
8 *Inc.*, 96 B.R. 440 at 449 (Bankr. S.D.N.Y. 1989). Metavante  
9 relies on *In re Lucre, Inc.*, 339 BR 648 (WD Mich.) for the  
10 proposition that a debtor's uncured pre-petition breach of its  
11 executory contract, here the event of default caused by the  
12 bankruptcy filings of LBHI and LBSF, will, in and of itself,  
13 justify continued nonperformance by the non-debtor  
14 counterparty, and mere commencement of bankruptcy proceedings  
15 and the imposition of the automatic stay does not empower the  
16 debtor to compel performance from a non-debtor party.

17 The Court rejects the Lucre decision as nonbinding and  
18 non-persuasive. While Metavante's argument for the events of  
19 default caused by the bankruptcy filings of LBHI and LBSF do  
20 create an obligation for it to terminate the Agreement under  
21 the safe harbor provisions, that's a tenable argument. Its  
22 conduct of riding the market for the period of one year, while  
23 taking no action whatsoever, is simply unacceptable and  
24 contrary to the spirit of these provisions of the Bankruptcy  
25 Code.

1 First, inasmuch as the Bankruptcy Code trumps any  
2 state law excuse of nonperformance, Metavante's reliance on New  
3 York contract law is misplaced. Moreover, legislative history  
4 evidences Congress's intent to allow for the prompt closing out  
5 or liquidation of open accounts upon the commencement of a  
6 bankruptcy case. Citation is to the Congressional history of  
7 this, H.R. Rep. 97-420 at 1 (1982), as well as its stated  
8 rationale that the immediate termination for default and the  
9 netting provisions are critical aspects of swap transactions  
10 and are necessary for the protection of all parties in light of  
11 the potential for rapid changes in the financial markets.  
12 Citation to the Senate Report number 101-285 at 1 (1990).

13 The safe harbor provisions specifically permit  
14 termination solely, quote, "because of a condition of the kind  
15 specified in Section 365(e)(1) that is the insolvency or  
16 financial condition of the debtor and the commencement of a  
17 bankruptcy case. See also *In re Enron Corp.*, 2005. WL 3874285,  
18 at \*4, Judge Gonzalez's case, 2005. Noting that a  
19 counterparty's action under the safe harbor provisions must be  
20 made fairly contemporaneously with the bankruptcy filing, less  
21 the contract be rendered just another ordinary executory  
22 contract.

23 The Court finds that Metavante's window to act  
24 promptly under the safe harbor provisions has passed, and while  
25 it may not have had the obligation to terminate immediately

1 upon the filing of LBHI or LBSF, its failure to do so, at this  
2 juncture, constitutes a waiver of that right at this point.

3 Metavante's references to defaults under certain  
4 unspecified indebtedness that allegedly may have created a  
5 cross default under the Agreement are of no moment. First,  
6 Metavante failed to set forth the basis, either in its papers  
7 or at the hearing, for its information and belief that such a  
8 default may have occurred. Its assertion that such a default  
9 may have occurred indicates that Metavante is not aware of any  
10 such default, and, therefore, did not rely on that default in  
11 its refusal to perform under the Agreement or lacks knowledge  
12 of what that default may be.

13 Additionally, the argument that LBSF or LBHI may have  
14 defaulted under other specified indebtedness, as that term is  
15 defined in the Agreement, relies upon the financial condition  
16 of bankruptcy debtors to withhold performance. That is also  
17 unenforceable as an ipso facto clause that may not be enforced  
18 under the Bankruptcy Code Section 365(e)(1)(A).

19 LBSF and LBHI are entitled to continued receipt of  
20 payments under the Agreement. Metavante's attempts to control  
21 LBSF's right to receive payment under the Agreement constitute,  
22 in effect, an attempt to control property of the estate. See  
23 In re Enron Corp., 300 B.R. 201 at 212 (S.D.N.Y. 2003),  
24 recognizing that contract rights are property of the estate and  
25 that therefore those rights are protected by the automated

1 stay.

2 This is a violation of the automatic stay imposed by  
3 Code Section 362. Accordingly, for the reasons set forth in  
4 LBSF's and LBHI's papers, for the reasons stated on the record  
5 at the hearing and for the reasons stated on the record today,  
6 pursuant to Bankruptcy Code Sections 105(a), 362 and 365,  
7 Metavante is directed to perform under the Agreement until such  
8 time as LBSF and LBHI determine whether to assume or reject.  
9 That's the ruling of the Court.

10 MR. KRASNOW: Good afternoon, Your Honor. Richard  
11 Krasnow, Weil, Gotshal & Manges, for the Chapter 11 debtors.  
12 We are close to the end of this morning's agenda, but not quite  
13 there as yet. The next item, Your Honor, is number 12. It is  
14 the motion of DnB Nor Bank described in the agenda. Your  
15 Honor, that matter has been fully submitted to the Court, fully  
16 briefed, arguments held on November 5th, and today is the  
17 scheduled status conference.

18 THE COURT: Okay. I'm ready to rule on that, but  
19 given the hour I'm not going to take the time to do that now.  
20 But we'll issue a short memorandum in due course. So as to not  
21 create any undue suspense for those parties who are here in  
22 connection with the DnB Nor matter, I am deciding that in favor  
23 of the debtors and against DnB Nor, denying DnB Nor's motion  
24 for allowance of an administrative expense claim, substantially  
25 for the reasons set forth in the committee's papers.

1 I have considered the supplemental briefs relating to  
2 the question that I had raised at the last hearing concerning  
3 the right of a secured party to adequate protection in respect  
4 of diminution resulting from currency exchange rate  
5 fluctuations. Following my consideration of those supplemental  
6 submissions I concluded that there was no need for my ruling to  
7 deal with that question because I was able, more narrowly, to  
8 decide the question simply on the basis of DnB Nor's failure to  
9 have timely requested adequate protection in its original  
10 motion with respect to the setoff and based upon my conclusion  
11 that the November 5 status conference hearing was a hearing  
12 that resulted in the grant of adequate protection prospectively  
13 and not retrospectively.

14 For that reason I believe that the request for  
15 administrative expense claim treatment as a superpriority claim  
16 and for adequate protection in respect of currency exchange  
17 fluctuations made in June, after adequate protection was  
18 already granted in November, was insufficient to provide for a  
19 claim within the period from September 17, 2008 to November 5,  
20 2008, nor was it sufficient in respect of any other date within  
21 the September to November time frame. That's effectively my  
22 ruling, but if you need more I will provide a memorandum  
23 decision consistent with what I've just said.

24 MR. KRASNOW: Thank you, Your Honor. Your Honor,  
25 last, but not least, item 13 on the agenda is the motion of

1 William Kuntz, III for review of the dismissal of his appeal.

2 THE COURT: Mr. Kuntz?

3 MR. KUNTZ: Thank you, Your Honor. I believe my  
4 express mail papers reached the Court late yesterday afternoon.  
5 I got an electronic message from the service company last  
6 Thursday indicating --

7 THE COURT: I have your reply papers --

8 MR. KUNTZ: Right. I just wasn't sure in terms of  
9 tracking it if they actually arrived.

10 THE COURT: I received them and read them with  
11 interest.

12 MR. KUNTZ: Saturday I went to look for the physical  
13 papers that should have come. They didn't come, but I'm  
14 waiving any problem in terms of that so that this long-standing  
15 matter can go ahead. And what I have to simply say is there's  
16 two questions in my mind. Will the debtor's counsel admit they  
17 had a deep involvement with Grand Union? I mean, Mr. Miller is  
18 not here, but, I mean, Mr. Krasnow, I believe, should now be  
19 aware that in the third Grand Union bankruptcy case Weil,  
20 Gotshal was the co-counsel in New Jersey before Judge Winfield.  
21 Which is -- the problem that I have is because there was an  
22 escrow account that apparently was applied to a loan that  
23 Lehman Commercial Paper had. Without Judge Winfield's order,  
24 or Judge Walsh's order back from the '95 case, and, I believe,  
25 that was done because there was an apprehension that if it had

1       come up before Judge Winfield that Judge Winfield would have  
2       ruled in my favor instead of this debtor's favor now.

3               Secondly, in terms of lifting the stay, it's not that  
4       I'm trying to reach the funds in this estate. But I have other  
5       matters. For instance, the New York State Comptroller's Office  
6       is holding funds of Grand Union Capital Corp., and they take  
7       the position that without a judgment I can't have those funds.  
8       And as I understand it, if I, for instance, proceeded in  
9       Westchester County without relief here, which is, in part, on  
10      appeal, if I was correct that Lehman is improperly holding  
11      these funds, if I received a judgment in state court that  
12      would, in essence, be a constructive lien upon funds that are  
13      at least being held by the debtor, whether they're funds of the  
14      debtor's estate or not. I haven't been able to determine.  
15      I've been asking for a long time just for the simple documents.  
16      Nothing has been volunteered by the debtor. C&S Wholesalers up  
17      in New Hampshire, I've called them and called them and written  
18      them and faxed them and that's, basically, in a nutshell, what  
19      I'm here for.

20              THE COURT: Okay. We'll --

21              MR. KUNTZ: Thank you, Your Honor.

22              THE COURT: But before you sit down I just want to  
23      understand something that's more technical. About eleven  
24      months ago, at a status conference/omnibus hearing, your motion  
25      was heard.

1 MR. KUNTZ: And denied.

2 THE COURT: And I remember it pretty vividly. It was  
3 mid-October. You were in the back of the courtroom. The case  
4 was called, and you said that you were going to just rely on  
5 the papers.

6 MR. KUNTZ: The courtroom was packed, Your Honor. It  
7 was the first omnibus hearing.

8 THE COURT: I remember it.

9 MR. KUNTZ: Thank you, Your Honor.

10 THE COURT: I remember it. And I remember seeing you.  
11 And I remember what you said. And I, having looked at your  
12 papers thoroughly, I concluded that you had not established  
13 cause for relief from the automatic stay under the very same  
14 legal standard that I have applied in every motion for stay  
15 relief that has been applied in this case and in every other  
16 case that is before me, which is the Sonnax case, which is a  
17 Second Circuit case that lays out a list of approximately  
18 twelve standards that Courts consider in deciding whether or  
19 not to grant relief from the automatic stay.

20 MR. KUNTZ: I understand that, Your Honor.

21 THE COURT: And --

22 MR. KUNTZ: The issue was, and I think I put this  
23 forward, was the order was with prejudice. I probably could  
24 have, without a prejudice denial I probably would have just let  
25 the matter sit.

1 THE COURT: So is the only -- just so I'm clear. The  
2 only issue that brings you back to Court on a Rule 60 motion is  
3 that you believe that the motion that you had filed should have  
4 been simply denied without prejudice as opposed to being denied  
5 with prejudice.

6 MR. KUNTZ: That's what I would have thought last  
7 fall. Things have developed a little bit more since then.

8 THE COURT: What's before me now? Is it the with  
9 prejudice/without prejudice language or are you seeking other  
10 relief?

11 MR. KUNTZ: I believe I'm seeking whatever is on the  
12 papers. I'm really not, I mean, this all came up in three days  
13 notice to me. So I put together a very -- I didn't even have a  
14 chance to even read in details the debtors' counsels' papers.

15 THE COURT: Look, here's my understanding of where we  
16 are procedurally. I ruled from the bench in October.

17 MR. KUNTZ: Yes, Your Honor.

18 THE COURT: You requested reconsideration under Rule  
19 60, and you also appealed the denial of your motion for relief  
20 from the automatic stay to the district court.

21 MR. KUNTZ: That's correct, Your Honor.

22 THE COURT: There was a hearing that took place before  
23 Judge Rakoff in the Southern District of New York.

24 MR. KUNTZ: It was a conference.

25 THE COURT: I only read the transcript of that

1 hearing, and, apparently, because of the pendency in the  
2 Bankruptcy Court of your Rule 60 motion --

3 MR. KUNTZ: That -- Mr. Krasnow brought that up in  
4 court, yes.

5 THE COURT: Well, appropriately --

6 MR. KUNTZ: Yes.

7 THE COURT: -- because it's jurisdictional. Judge  
8 Rakoff determined that the district court did not have  
9 jurisdiction of the appeal because there was a pending and  
10 unresolved Rule 60 motion that was still in the Bankruptcy  
11 Court.

12 MR. KUNTZ: That's correct, Your Honor.

13 THE COURT: As a result this matter has been listed  
14 for today, as I understand it, solely for purposes of dealing  
15 with the Rule 60 motion that was filed shortly after my denial  
16 of your motion last year for stay relief. Correct?

17 MR. KUNTZ: Based, apparently, upon the affidavit that  
18 I filed subsequent to the conference in district court. But,  
19 yes, in essence, yes, Your Honor.

20 THE COURT: Okay. So I haven't heard you make an  
21 argument yet as to why you're entitled to relief from the order  
22 that was entered in October denying your motion for stay  
23 relief.

24 MR. KUNTZ: I haven't read the Sonnax opinion, Your  
25 Honor.

1 THE COURT: Excuse me?

2 MR. KUNTZ: I haven't read the Sonnax opinion, Your  
3 Honor.

4 THE COURT: Okay.

5 MR. KUNTZ: It, you know, I look at it in terms of a  
6 pragmatic situation. The people who know best what happened to  
7 this money, the 4 or 5 million dollars, are sitting right here.  
8 And they, up until I put in Judge Martin's (ph.) decision,  
9 which listed Weil, Gotshal as co-counsel in Grand Union, they  
10 basically are just, sort of, like, the three moneys sitting  
11 there. We don't know. This said, you know --

12 MR. KRASNOW: Objection, Your Honor.

13 MR. KUNTZ: And then, in the -- may I finish, Mr.  
14 Krasnow?

15 THE COURT: The -- at --

16 MR. KUNTZ: And then in the --

17 THE COURT: Mr. Kuntz.

18 MR. KUNTZ: -- WorldCom fee application --

19 THE COURT: Mr. Kuntz. Let me just break in. We're  
20 having, and I know you're pro se --

21 MR. KUNTZ: Pro se has nothing to do with this, Your  
22 Honor. This is a misrepresentation by this firm, to this  
23 Court, on matters of record in New Jersey and in this district.

24 THE COURT: But let me just stop you.

25 MR. KUNTZ: Thank you, Your Honor.

1           THE COURT: This is a very narrow legal question. And  
2 even though you're pro se I need to keep it narrow. We're not  
3 talking about Weil, Gotshal's role, if any, in another  
4 bankruptcy case.

5           MR. KUNTZ: It's --

6           THE COURT: Nor are we talking about Weil, Gotshal's  
7 role in this case. The only thing we're talking about is  
8 whether you have cause to prevail in connection with a motion  
9 under a particular, narrowly construed, federal rule that  
10 allows someone relief from an order or judgment after it has  
11 been entered.

12          MR. KUNTZ: I understand perfect, Your Honor. That's  
13 why we're here today.

14          THE COURT: Okay. That's what I want to limit the  
15 discussion to.

16          MR. KUNTZ: Well, when I am confronted with a rolling  
17 reference to a case in Oklahoma that has -- it is totally  
18 unrelated to the simple issues of if this debtor is holding or  
19 not holding millions of dollars taken from an escrow account.  
20 I'm not dealing with a Visa card account or not dealing with an  
21 eminent domain case in that. If those issues had been fairly  
22 addressed last year I wouldn't be standing here now. I simply  
23 would have, as Your Honor may note, filed my proof of claim and  
24 waited for the claims objection to come.

25          THE COURT: Have you filed a proof of claim?

1 MR. KUNTZ: Yes, I have. And I amended them this  
2 morning again.

3 THE COURT: Okay. If you have filed a proof of claim,  
4 and I don't get to the merits of that --

5 MR. KUNTZ: I understand, Your Honor.

6 THE COURT: -- at today's hearing, you have submitted  
7 the very same matter that is the subject of your earlier motion  
8 for stay relief to the claims administration process in the  
9 bankruptcy, have you not?

10 MR. KUNTZ: In part, Your Honor. My problem is, is  
11 that the -- that the -- there is no direct contractual  
12 relationship between Grand Union Capital Corp. and this debtor.

13 THE COURT: Then you may have no claim at all.

14 MR. KUNTZ: That may be, Your Honor, but the --

15 THE COURT: In which case we're spending a lot of time  
16 talking --

17 MR. KUNTZ: That may --

18 THE COURT: -- about something that --

19 MR. KUNTZ: That may be, Your Honor.

20 THE COURT: -- doesn't relate to Lehman.

21 MR. KUNTZ: But, you know, I'm hesitant to institute a  
22 proceeding in Westchester County State Court that might operate  
23 as a theoretical or practical lien upon these funds. And this  
24 is why I'm being overly careful. Most people would have paid  
25 no attention to it until they got the boom lowered on them. I

1 know better.

2 THE COURT: Well --

3 MR. KUNTZ: I've said enough, Your Honor. Thank you.

4 THE COURT: Whether you are proposing some kind of  
5 litigation in New York State Supreme Court in Westchester that  
6 may implicate the automatic stay in this bankruptcy case, I do  
7 not know. The only thing I can comment on is what's before me  
8 now, which is a motion under Rule 60(b) for relief from the  
9 order entered last October, 2008 denying your motion for stay  
10 relief, which was a bench ruling followed by an order that was  
11 entered of record. I'm going to let debtors' counsel speak to  
12 the issue, and then I'll rule on the 60(b) motion and we'll go  
13 to lunch.

14 MR. KRASNOW: Your Honor, Richard Krasnow, Weil,  
15 Gotshal & Manges. I stood to object to some of Mr. Kuntz's  
16 characterizations. I continue to object to them. Having said  
17 that, Your Honor, we rely on our pleadings and for the reasons  
18 set forth request that the Court deny the application. Thank  
19 you, Your Honor.

20 THE COURT: I've considered the papers filed,  
21 including Mr. Kuntz's reply, which I did receive yesterday, and  
22 I've considered the oral argument that has been presented by  
23 Mr. Kuntz on his own behalf. I understand his sensitivity to  
24 not wanting to violate the automatic stay. That sensitivity  
25 will continue as a result of this ruling. I am not revisiting

1 today the determination made last October to deny Mr. Kuntz's  
2 request for relief from the automatic stay.

3 The nature of Mr. Kuntz's claim as against the Lehman  
4 estate remains obscure to me, even as a result of the  
5 representations made concerning a possible constructive trust  
6 over assets that belong to the estate of another debtor, Grand  
7 Union Company. As I said previously, I know nothing about that  
8 case. I had no involvement in that case. I have not studied  
9 the docket or decisions from that case. I'm simply dealing  
10 with the case which is before me, which is the Lehman Brothers  
11 case.

12 It's apparent that Mr. Kuntz, based upon the papers  
13 filed, has not stated good cause for relief from the earlier  
14 order denying his motion for relief from the automatic stay.  
15 As a result that order stands, and from a procedural  
16 perspective this means that the 60(b) motion, having been  
17 resolved, is not longer pending in this court, which presumably  
18 means that to the extent there is an appealable right, and I'm  
19 not saying that there is one, that Mr. Kuntz can exercise to go  
20 back to the district court, the fact that there is a pending  
21 60(b) motion no longer is an impediment to such procedure.  
22 Whether or not it is available, however, given the passage of  
23 time, is something that I don't comment on, nor am I asking  
24 anyone else to comment on.

25 MR. KRASNOW: Thank you, Your Honor. I believe we

1 have covered all of the matters for this morning.

2 THE COURT: Those who are coming back I will see at  
3 2 o'clock.

4 MR. KRASNOW: Thank you, Your Honor.

5 THE COURT: We're adjourned till then.

6 (Proceedings recessed from 1:15 p.m. until 2:04 p.m.)

7 THE COURT: Be seated, please.

8 MR. SLACK: Good afternoon, Your Honor. Richard Slack  
9 from Weil Gotshal, for the debtors. In the first adversary  
10 proceeding on for this afternoon is the matter of Neuberger  
11 Berman v. PNC Bank and others. It is an interpleader action,  
12 Your Honor, and we're here on a pre-trial conference.

13 Briefly, Your Honor, what this case involves is a  
14 series of transactions that were back to back essentially where  
15 Neuberger Berman and a Lehman entity entered into a swap. It  
16 was -- there was another swap with another Lehman entity and  
17 then finally with PNC. There are -- there's a litigation, as  
18 Your Honor may know, in Pennsylvania that's ongoing, and  
19 Neuberger instituted this action which is an interpleader,  
20 essentially saying to this Court that it knows it has to pay  
21 the money and it's not sure to who.

22 There's a number of motions that have been filed and  
23 have been essentially put off because the parties are in fact  
24 in very serious negotiations over a settlement. It has taken a  
25 fair amount of time because there's a lot of moving pieces.

1 More recently, we've brought the committee into that process to  
2 work with us in trying to reach a settlement. I think, again,  
3 in all fairness, it's something that has moved slower than  
4 anybody thought, but the negotiations are in fact ongoing and,  
5 I think, have a great chance of being fruitful.

6 THE COURT: Good.

7 MR. SLACK: With that, Your Honor, I think that, from  
8 the debtors' point of view, even though we're here on a pre-  
9 trial, we think that the Court should recognize the efforts of  
10 all the parties in trying to reach agreement here and  
11 essentially put everything off until the next omnibus to give  
12 the parties a chance to reach agreement.

13 THE COURT: Does everybody concur in that assessment  
14 that time is helpful to the process?

15 MR. COHEN: Good afternoon, Your Honor. David Cohen  
16 with Milbank Tweed, here on behalf of the committee. We agree  
17 with that recommendation.

18 MR. YORSZ: Your Honor, Stan Yorsz for PNC Bank. We  
19 were the entity who started this with the case in the Western  
20 District of Pennsylvania. And I --

21 (Noise over loudspeaker.)

22 THE COURT: I don't think that was you.

23 MR. YORSZ: I agree that --

24 THE COURT: You agree it wasn't you.

25 MR. YORSZ: I agree it wasn't me. I would have

1 prefaced that by saying "Your Honor". I didn't mean any --

2 I agree that we have made considerable strides, and in  
3 fact there are draft stipulations circulating.

4 THE COURT: Good.

5 MR. YORSZ: We, PNC, wanted to get before Your Honor  
6 primarily because we believe LBCC has had some time now to  
7 determine what its position is. They had originally asked for  
8 an extension of time to answer or respond to July 22nd; that's  
9 been long gone. And we would just appreciate if we could get  
10 some indication from LBCC when they are going to provide some  
11 information to us on where they believe they stand, because I  
12 think the parties have been trying to effect a settlement, and  
13 we think it is an adversary proceeding that is imminently  
14 settlable.

15 The judge in the Western District of Pennsylvania has  
16 been cooperative in extending time for us to try to work it out  
17 up here because this is the lynchpin, but we would appreciate  
18 some guidance from either LBCC or the Court on, instead of  
19 simply saying let's put this over, if we could have some type  
20 of time within the next ten days, two weeks, when we could get  
21 some type of response from LBCC as to what its position is.

22 THE COURT: What kind of response are you looking for?

23 MR. YORSZ: We're -- well, we're looking for a  
24 response that LBCC has decided that it does not have an  
25 interest in what is essentially six million dollars that

1       Neuberger Berman has agreed that it would owe to PNC Bank if it  
2       were found liable. Ideally, that is a response, but at the  
3       very least, we'd like a response that they think they do have  
4       an interest in it and we can get started with this.

5               THE COURT: Isn't that part of the settlement process,  
6       or am I missing something?

7               MR. YORSZ: No, no, it is, but we have -- we've been  
8       at this for about --

9               THE COURT: And you're saying this is a missing  
10       ingredient --

11              MR. YORSZ: Yes.

12              THE COURT: -- that will help --

13              MR. YORSZ: We've been at this for a month and a --

14              THE COURT: -- that will help heal the settlement?

15              MR. YORSZ: Yes, yes. We've been at this for a month  
16       and a half, and at least from my client's point of view we  
17       don't seem to be making much progress, at least with regard to  
18       the LBCC position. So they would like, if possible, some  
19       indication of when we can get a response other than simply  
20       saying let's put it off, because unfortunately it may be if we  
21       put it off to the next month we're going to be here in the same  
22       position.

23              So, again, we would just like, if we could, get from  
24       LBCC some indication that okay, we've looked at everything, in  
25       ten days we'll tell you.

1           THE COURT: I think, as a result of being here today  
2           and making that presentation, you will not be in the same  
3           position next month. I don't know what position you'll be in,  
4           but it's not unreasonable to expect parties who are involved  
5           actively in settlement discussions to commit to a position  
6           between now and the time that a settlement is reached. What's  
7           the problem from LBCC's perspective? Is there a problem?

8           MR. SLACK: Your Honor, I'm a little surprised by that  
9           presentation. And we have been, I think, fairly clear with  
10          parties in a settlement context, which I think is the point of  
11          having settlement discussions, about what our positions are --

12          THE COURT: By the way, the settlement discussions are  
13          not going to be the subject of this conference, that's for  
14          sure. I don't want to hear anybody comment on something that's  
15          supposed to part of an ongoing and privileged and private  
16          discussion.

17          MR. SLACK: Your Honor, and that's exactly the point  
18          I'm making is that the only thing we haven't done is answer the  
19          interpleader complaint publicly. On a, what I'll call, private  
20          basis, we have had discussions. And I think that's reflected  
21          by the fact in the presentation that we just heard that there  
22          have been stipulations that have been -- gone back and forth.  
23          I mean, the parties are not far apart, I believe, in this.  
24          That doesn't mean you'll reach settlement, Your Honor. I  
25          understand that there still is some gap, and gaps sometimes

1 don't get filled, but I think it would not be beneficial for  
2 LBCC to be taking a public position in papers while settlement  
3 negotiations are ongoing.

4 THE COURT: I appreciate what you've said. I don't  
5 think I heard counsel request that anything be done publicly.  
6 I think it was a line in the sand for my benefit as much as for  
7 anybody else's to say that this process should not be allowed  
8 to go from month to month without meaningful progress. And I  
9 believe that I heard it suggested that if LBCC could express  
10 privately a position that it's prepared to live with with  
11 respect to whatever this missing piece is of the puzzle. And I  
12 know nothing about these discussions and will, as a result,  
13 make any number of stupid remarks between now and the end of  
14 this conference.

15 But my suggestion is that between now and the next  
16 status hearing we simply calendar it forward; there seems to be  
17 no objection to that. The parties acknowledge that ongoing  
18 discussions appear productive. There's a statement of concern  
19 that this may not be a month well spent unless certain  
20 positions are committed to privately by LBCC with respect to  
21 this dispute, I believe that's what I heard, and I would  
22 encourage that, although I'm not directing it, to the extent  
23 that's helpful to get this to a satisfactory conclusion. And I  
24 would hope that by calendaring this in October no one's going  
25 to want to be standing up and saying, well, we wasted a month.

1           So I suggest you use the month productively, and if  
2           you get to a settlement, do that. If you can't get to a  
3           settlement, I think you need to realistically assess the  
4           durability and difficulty of the dispute and whether or not  
5           it's something that can be effectively resolved by more time,  
6           by a mediator or by starting your engines and actually actively  
7           litigating the dispute here. It seems to me that next month is  
8           not a bad time for you to make that assessment. Does that make  
9           sense?

10           MR. SLACK: That certainly makes sense to us, Your  
11           Honor.

12           THE COURT: Incredible, because I don't know what I'm  
13           saying to you other than what I've heard you say, and I'm kind  
14           of repeating it back to you.

15           So if that makes sense, let's proceed on that basis.

16           MR. YORSZ: Thank you, Your Honor.

17           THE COURT: So that'll be on the October calendar,  
18           whenever we're hearing adversaries in October.

19           Next is State Street v. Lehman Commercial Paper.

20           MR. PHELAN: Good afternoon, Your Honor. Andrew  
21           Phelan on behalf of State Street Bank. This is a matter, Your  
22           Honor, that has not been in front of the Court in quite some  
23           time, not unlike the Neuberger case we have been put off from  
24           month to month on continuing the initial pre-trial conferences  
25           and status conferences.

1 I thought I would take just a couple of minutes to let  
2 you know where we are in the overall proceeding --

3 THE COURT: Okay.

4 MR. PHELAN: -- and to indicate where we are going in  
5 the next proceeding and likely schedule another initial pre-  
6 trial conference in October, as in Neuberger.

7 In this original complaint -- you may remember it,  
8 because we were surprised at how well you remembered it the  
9 last time we were in court -- State Street filed a --

10 THE COURT: I actually remember it vividly.

11 MR. PHELAN: -- State Street filed an adversary  
12 complaint regarding a repo transaction, a one billion dollar  
13 repo transaction, as a result of which State Street has  
14 purchased thirty-six loans.

15 We -- and the complaint was made up of two parts: one  
16 addressing those thirty-six loans and difficulties State Street  
17 alleged it was having with regard to getting cooperation and  
18 principal interest payments and such, and then the second part  
19 of that adversary complaint regarded a thirty-seventh loan  
20 involving 340 Madison, which State Street alleged was  
21 improperly taken out or converted from its repo account on the  
22 eve of the Lehman bankruptcy. And so State Street was  
23 proceeding with trying to recover that asset under a  
24 conversion-type theory.

25 In the months since November, the parties have been

1 cooperating and they have made substantial progress on the  
2 first half of the complaint as well as some significant  
3 progress on the second half. And on the first half, originally  
4 there were thirty-six loans; six of them were resolved -- or  
5 four were resolved in an exchange agreement that this Court  
6 signed, and then a total of twenty-five or twenty-six others  
7 have been the subject of A&As (ph.) that this Court has signed.  
8 So the parties have been able to make substantial part of the  
9 case.

10 The -- State Street has not come in and amended its  
11 complaint every time a new A&A has been filed. So the original  
12 complaint still stands as to that part of the case.

13 As the Court might expect, the easier ones, the Lola  
14 Hane (ph.) group, were the ones that were resolved through the  
15 A&As and through the proceedings so far, and the more difficult  
16 are the ones before that the parties are grappling with now.  
17 This is the second bucket. So the first bucket is the thirty-  
18 some-odd loans that have been resolved; for the most part there  
19 are no pending disputes with regard to that.

20 The second bucket is the ones that are -- have a  
21 little bit of hair on them that the parties are trying to  
22 resolve and are continuing their efforts to do so. There is no  
23 current indication that we are going to be involved in drawing  
24 the line in the sand and going forward with litigation on  
25 those, although we may need the Court's assistance if we can't

1 get some kind of discovery disclosure on some of them. But I  
2 will work on that with Mr. Comet and with the other real estate  
3 counsel that are involved for both sides.

4 The final bucket is the 340 Madison loan, which is one  
5 that has been carved out because it is not reasonably likely  
6 that the parties are going to settle their dispute with regard  
7 to that loan. We say it should have been in our repo pool;  
8 their position is that it should not have been. So never the  
9 twain shall meet on that issue unless we have some litigation  
10 and get some discovery on that point.

11 THE COURT: Where does that loan reside at this  
12 moment?

13 MR. PHELAN: It now resides with Lehman -- I believe  
14 it's Lehman Brothers Holdings, Inc., not LCPI, but that's as  
15 far as I know so far.

16 Now, Mr. Comet and I have been working together on  
17 electronic discovery issues, which have taken six or eight  
18 weeks. The parties have been going back and forth to try to  
19 identify what's needed to find search times and such that I  
20 won't trouble you with, but progress is being made there,  
21 albeit somewhat slow progress.

22 The parties then -- we also served a subpoena on  
23 Trimount (ph.), which is a third-party service server, and some  
24 delays -- there are some brief delays there, but I believe that  
25 productions will start within a week or so in that matter.

1           This brings us to where we are now with regard to the  
2   340 Madison dispute. State Street in June or July amended its  
3   complaint as to the 340 Madison loan, and LCPI has answered  
4   that complaint just as to the 340 Madison loan part. So we're  
5   in a bit of a bifurcated situation where part of the adversary  
6   complaint is just remaining in a holding pattern as the parties  
7   work through and another part of it is proceeding.

8           We're at the point now that we need to develop and  
9   agree to a scheduling order or a trial schedule, discovery  
10   schedule, expert schedule in that matter. And I raised this,  
11   after we continued hearings month after month after month, a  
12   little bit late with Mr. Comet. So we have not finalized a  
13   schedule. We are in the neighborhood/in the ballpark, I  
14   believe, of having agreements on a schedule, which is why  
15   nothing yet has been submitted to the Court.

16          One issue that would be of assistance to State Street  
17   at least and, I believe, to LCPI is to understand where the  
18   Court is scheduling trials and what kind of a time frame we are  
19   looking for, because that's one of the issues that is keeping  
20   the parties apart a little bit. They want a period that's  
21   one -- or two to three months shorter than what State Street  
22   has proposed, and I don't want to build in too little time for  
23   the discovery that is needed in the event that we have more  
24   delays in getting the discovery that's needed to proceed with  
25   the action.

1           So the framework we're looking at now would have  
2       discovery closing in this matter next June, June of 2010, with  
3       expert discovery following -- for the following -- I believe  
4       it's two months, and motion or a pre-trial order coming in -- I  
5       believe it's September or October of 2010 under the schedule  
6       that Mr. Comet and I have discussed.

7           THE COURT: That's a pretty prolonged work plan. I'm  
8       not going to micromanage how much time is necessary to get to  
9       be trial-ready, and I appreciate your update. I don't  
10      understand at this moment what's going on with 340 Madison, nor  
11      do I understand why this is a dispute that can't be compromised  
12      globally. Part of what I need to understand from Mr. Comet, I  
13      think, is what it is about 340 Madison in particular that  
14      differentiates it from the other loans within the pool. I also  
15      need to know if there are any other similarly disruptive pieces  
16      of loan collateral that might be time-consuming.

17           And, and this is really my overarching question, it  
18      seems me that the parties up to this point have been quite  
19      effective in working out, through exchange agreements and  
20      otherwise, commercial solutions in reference to the pool of  
21      assets that are the subject of this repo transaction.

22           I'm not understanding why there is a need for ongoing  
23      litigation that includes a close of pre-trial activity a year  
24      from now in a dispute where parties have been so apparently  
25      effective in working with each other in resolving various

1 trades of assets to match, as I recall, certain assets that  
2 belong together that weren't there in the first place when the  
3 music stopped last year.

4 So my overarching question is, what makes this dispute  
5 so hard to resolve since you've been able to resolve so many  
6 little pieces of it up till now?

7 MR. PHELAN: I think -- and I'll answer the first part  
8 of it and have Mr. Comet provide what input he has on it. With  
9 regard to the 340 Madison, that's one loan that we know very  
10 little about except for the fact that it was taken out --

11 (Dialing noise over loudspeaker.)

12 THE COURT: Can you click that off?

13 MR. PHELAN: -- except that it was taken out of our  
14 repo pool on the eve of the Lehman Brothers bankruptcy. We  
15 also have, and we allege in our complaint -- not allege; we  
16 have recordings of communications about needing more assets for  
17 our repo loan and individuals on behalf of Lehman saying that  
18 they will be getting us more and better assets, because what  
19 was in there was not sufficient.

20 We don't know the details of what went on and how --  
21 who was valuing the Lehman loans. There are some things that  
22 we don't know that we need to know, I believe, that would  
23 assist in opening up the discussions to see if there can be a  
24 resolution of that or not. But it's what we don't know that we  
25 don't know, so we can't make much progress until we get that.

1 I am anticipating that the parties should, within the  
2 next month, be producing -- or hopefully two weeks -- be  
3 starting to produce their electronic records, the e-mail  
4 traffic, which may very well be the most relevant evidence here  
5 as to what was happening and why the 340 Madison was taken out.  
6 That's -- that would be my answer: I just don't know enough on  
7 that issue.

8 THE COURT: Okay.

9 Mr. Comet, can you help me on this too?

10 MR. COMET: Yes. Howard Comet, Weil, Gotshal &  
11 Manges, for the debtors, Your Honor. To explain the situation  
12 regarding the 340 Madison loan, Your Honor, I need to just  
13 spend a moment explaining the overall structure of this  
14 arrangement. As Mr. Phelan said, this was a -- well, the  
15 repurchase agreement under which Lehman agreed to provide  
16 essentially a billion dollars' worth of loans with a certain  
17 margin above that to State Street, and this was a pool of  
18 loans.

19 If you parse through the agreements, I think it's  
20 quite clear and unambiguous that the agreements gave Lehman  
21 essentially complete right to decide what loans would be in  
22 this pool at any given point in time to take loans out, put  
23 loans in. And they did that regularly. And as long as they  
24 maintained the required valuation, that was all that they were  
25 required to do.

1           The 340 Madison loan was taken out of the pool on  
2           September 15th of last year, actually one year ago today, which  
3           was, as the Court of course knows, one day before the  
4           bankruptcy of the parent company, although the particular  
5           contracting party here, LCPI, did not file until, I believe,  
6           sometime in early October.

7           THE COURT: I think the dates are September 15th and  
8           October 3rd, I think, so that I'm not sure that you could have  
9           moved assets on September 15 because the bankruptcy was filed  
10          early in the morning on September 15, which was last year a  
11          Monday morning.

12          MR. COMET: Well, this -- well, this has -- the LCPI  
13          was not in bankruptcy, but -- and I may have the dates off by  
14          one, Your Honor, but it was --

15          THE COURT: Well, LCPI was not in bankruptcy --

16          MR. COMET: Right.

17          THE COURT: -- I believe, until October 3.

18          MR. COMET: Right. Exactly.

19          THE COURT: 5? October 5. I got a hand signal from a  
20          cooperative Weil Gotshal partner.

21          MR. COMET: The -- so I'm not -- there was no notice  
22          of default here from State Street until September 17th; I'm  
23          pretty confident of that date. And so I -- the bankruptcy is  
24          an issue -- and the notice of default was not based on the  
25          bankruptcy filing; it was based on other grounds.

1           So the issue of the bankruptcy here is simply, I  
2     think, that State Street has a supposition that because of the  
3     eminency of the bankruptcy filing this loan was taken out.

4           As far as we know, this had gone on, as I said,  
5     regularly, Your Honor. Loans were taken in and out of this  
6     pool based on the valuations that were placed on it. The  
7     Lehman records show that when this loan was taken out the  
8     required valuation continued to exist in the loan pool. And we  
9     know of no reason to think there was anything unusual about  
10    this.

11           I think there's no conceivable contract claim here  
12    that there was anything improper about taking a loan out  
13    because the contracts gave Lehman complete discretion. In  
14    fact, the operative language in the -- there's a series of  
15    agreements; each one supersedes the other in terms of any  
16    conflict. The operative language in the controlling agreement  
17    says "Seller", that's Lehman here, "shall have the unlimited  
18    right to substitute and/or withdraw purchased securities." And  
19    the agreement's also very clear that if Lehman withdraws a  
20    security, that terminates any interest that State Street has in  
21    a security, whether it's considered an ownership interest or a  
22    security interest, because the agreements all speak in terms of  
23    the possibility that it might be one or the other.

24           If -- what it says is "Upon" -- this is actually in  
25    the custodial agreement where the loan documents are kept:

1 "Upon transfer from the Buyer", that would be State Street's  
2 custodial account, "the Leased Assets shall cease to be  
3 purchased assets for all purposes hereunder, and without  
4 further action the security interest granted by the Seller to  
5 the Buyer with respect to such purchased assets shall be  
6 automatically released."

7 So State Street has, I believe, no contract claim.  
8 They have a separate claim that, to the extent the loans  
9 they've now received are ultimately received, or at whatever  
10 the appropriate date is, value less than a billion dollars,  
11 they have a deficiency -- a potential deficiency claim for  
12 which they could file a proof of claim. But what they're  
13 seeking to do in this action is say even though the contract  
14 may have said that you can take loans in and out, we somehow  
15 continue to own this 340 Madison loan notwithstanding this  
16 contract language.

17 And I think what the action is is in many ways a  
18 fishing expedition to find a basis to support that claim. We  
19 seriously considered filing a motion to dismiss but thought  
20 that, since in many cases a motion to dismiss is met with  
21 response, at least we should get some chance to find out the  
22 facts through discovery, that we would go forward at least  
23 initially with discovery. And I am becoming very concerned  
24 that the discovery process seems to be a lot more burdensome,  
25 onerous and extended than we had expected.

1 I -- we do have a dispute with State Street about the  
2 length of the process. I've suggested that we have a much  
3 significantly shorter discovery schedule and trial schedule  
4 than Mr. Phelan has suggested. I think we seem to be heading  
5 towards disputes on numbers of depositions and things of that  
6 sort as well.

7 And it may yet be the case, Your Honor, that we move  
8 for a judgment on the pleadings in order to get a determination  
9 whether there really is any legal issue here. I mean, the  
10 legal theories advanced are conversion, but I think that  
11 assumes the ownership interest that's in dis -- that we say  
12 under the contract clearly doesn't exist, constructive trust,  
13 but that is of course the usual last resort of somebody to try  
14 to create an ownership interest and depends upon proof of a  
15 fiduciary relationship, which I think is highly unlikely here.

16 So I think there's some serious issues about the case  
17 and the discovery, Your Honor, and whether it makes sense in  
18 that respect.

19 From the commercial perspective, Your Honor, the  
20 diff -- we've been able to resolve the other loans because  
21 they're really -- there's no dispute as to the other loans that  
22 remained in the pool, that Lehman had transferred something to  
23 State Street in connection with those loans. There could have  
24 been a dispute potentially as to whether it was ownership or a  
25 security interest, but it seemed not worth litigating that

1       because, even if they ended up as just holders of a security  
2       interest, it'd essentially be the same position.

3               THE COURT:   Is 340 Madison the only problem loan that  
4       we're talking about?

5               MR. COMET:   It's the only one of this sort, Your  
6       Honor.  There are no others that -- there's -- where there's  
7       any question that they were in the pool.  As Mr. Phelan said,  
8       there are a few that we're working on.  There's one, for  
9       example, I know of that the documentation has all been prepared  
10      for State Street to simply take it over, and State Street has  
11      decided they may not want it and is waiting for that reason.

12              THE COURT:   And what's the assumed value, unless  
13      that's a really loaded question, of the 340 Madison loan?

14              MR. COMET:   The -- I don't have a today valuation,  
15      Your Honor.

16              THE COURT:   Is this all worth fighting about?  That's  
17      what I'm trying to figure out.

18              MR. COMET:   Right.  At the time that the loan was  
19      removed from the pool, it -- depending on how you look at it,  
20      it was valued at, I'd say, approximately twenty-five million  
21      dollars.  There's one valuation that puts it at twenty-eight;  
22      there's another that puts it with a haircut involved in the  
23      margin at twenty-four something.  So it's in -- I shouldn't  
24      have said twenty-eight; twenty-six, and then there's another,  
25      twenty-four.  So it's in the neighborhood of twenty-five

1 million dollars.

2 THE COURT: It's in the mid-twenties, whatever it is.

3 MR. COMET: Yes. Which in the context of a billion  
4 dollar loan pool is relatively small. I think --

5 THE COURT: That's my point: Why are we fighting for  
6 a year over a rounding error?

7 MR. COMET: I agree, Your Honor. I think there may be  
8 opportunities for the parties to sit down and, in conjunction  
9 perhaps even with some of the other loans that remain to be  
10 fully dealt with, to see if this can be factored in some kind  
11 of resolution of it. The -- you know, the issue is that  
12 twenty-five million dollars, Your Honor, obviously is a  
13 significant amount of money even --

14 THE COURT: I'm not by any means suggesting that  
15 twenty-five million dollars is not a significant amount of  
16 money; it is. And this is an estate in which, while we throw  
17 around big numbers at each hearing, twenty-five million dollars  
18 is real money and it's clearly worth fighting over not only  
19 because of the notional amount but because of the principal  
20 that's involved. I don't know that State Street's repo  
21 transaction is the only repo transaction we need to be  
22 concerned with. We're drawing bright lines that matter for  
23 purposes of estate assets and the assets of counterparties.

24 My only reason for referencing the relative value of  
25 the 340 Madison loan is that I have observed during the life of

1       this litigation what I view as constructive and cooperative  
2       behavior exhibited by counsel for State Street and counsel for  
3       LCPI in connection with the transfer of underlying assets,  
4       matching assets up and working out agreements. All I'm  
5       suggesting is that if 340 Madison is but one of thirty-seven  
6       total loans, thirty-six being indisputably in the pool and this  
7       one being disputably either in or out, it seems to be a  
8       universe that can be tackled.

9               MR. COMET: I think you're right, Your Honor, at least  
10       certainly the effort should be made. I suspect, given the real  
11       estate market and so on and without having an actual valuation,  
12       that we're probably really talking less than twenty-five  
13       million in actual value today in any event; but as I said, we  
14       don't have a current appraisal.

15              THE COURT: Would mediation be helpful to the parties?  
16       I spent the entire morning dealing with alternative dispute  
17       resolution issues for in-the-money derivative transactions.  
18       The order applies only to those, but the concept applies across  
19       the board to all disputes in this case. The only thing that  
20       distinguishes this from the other potential disputes is that  
21       this is a real dispute. And there are real orders involved,  
22       and I could, if I wanted to, direct that you mediate. Would  
23       that be useful?

24              MR. COMET: It may be, Your Honor. One shortcoming I  
25       have in responding is that a lot of the discussions that have

1     gone on about this I have not been involved in. As Mr. Phelan,  
2     I think, suggested, the real estate lawyers have been  
3     talking -- on each side, have been talking to each other  
4     directly. And I would like, if I could, to consult with them  
5     and then talk with, I guess, Mr. Phelan maybe. And I think it  
6     may well be helpful. Could we -- I guess my question would be,  
7     could we advise the Court on that after checking with our  
8     clients and so forth?

9             THE COURT: My suggestion, based upon this dialogue,  
10     is that we put this over to the October adversary omnibus date  
11     and that between now and next month that the parties at least  
12     explore the following things: First, there has to be a way to  
13     deal with what seems to be a relatively narrow dispute in less  
14     than a year's worth of discovery. That seems to me to be a  
15     prolonged period not justified by my understanding of this  
16     dispute. So come up with a much shorter period if this thing  
17     has to be litigated, or come up with a justification for a  
18     longer period, because I haven't heard one.

19             Secondly, I believe that from what I've heard this is  
20     a dispute that's capable of resolution by the parties  
21     themselves or by the parties with the assistance of a mediator  
22     if the parties can't. Past behavior suggests an ability to  
23     reach agreements on at least portions of the pool. I see no  
24     reason why agreements can't be reached on the entirety of the  
25     pool. But whether or not it can or cannot be achieved, the

1 process of attempting to achieve such a settlement may help the  
2 parties narrow the issues or at least reach partial settlement.

3 So I would suggest that that at least be explored  
4 within the month, and I'd like a status report on your efforts  
5 next month. At the next status conference, we should set a  
6 pre-trial order if you're unable to reach an agreement either  
7 on a settlement or means to achieve a settlement. And I'm  
8 going to treat this much like the previous case involving  
9 Neuberger Berman as a matter that's going to go to next month  
10 with a progress report to be made, and then we can set dates in  
11 October.

12 MR. COMET: Very good, Your Honor.

13 THE COURT: Sound reasonable to both of you?

14 MR. PHELAN: That is acceptable, Your Honor. Thank  
15 you.

16 THE COURT: Okay, fine.

17 MR. COMET: Thank you.

18 THE COURT: Next is BNY Corporate Trustee Services.

19 (Pause)

20 THE COURT: This really does seem to be the perpetual  
21 litigation.

22 MR. SCHAFFER: Indeed.

23 THE COURT: That's my pun of the afternoon.

24 MR. SCHAFFER: Your Honor, Eric Schaffer, Reed Smith  
25 for BNY Corporate Trustee Services.

1           Your Honor, we're not hear to reargue the motion to  
2       dismiss, we lost. We're here for the limited purpose of  
3       dealing with the issues raised in the motion for a stay. We're  
4       seeking a stay only until the district court can determine  
5       whether or not to accept -- to deal with our motion for leave  
6       to appeal. If it denies that it's a very short stay we're  
7       talking about. If it accepts that appeal, leave is granted, we  
8       would ask for a stay to continue.

9           One thing that occurred to me earlier today, Your  
10      Honor, is that a stay does not have to interfere with briefing  
11      summary judgment. As you know, we're going to be here anyway  
12      in the AFLAC case dealing with similar issues so I think it  
13      would be inappropriate for me to say let's stay that also. But  
14      we do ask that the decision on summary judgment, if there were  
15      to be one, be stayed. My reason for proceeding with the motion  
16      today is that while theoretically we might have raised it  
17      closer to the summary judgment argument, I don't want to be in  
18      a situation where someone says you should have been here in  
19      September, you're too late.

20           Your Honor, one other preliminary matter. LBSF says  
21      that we didn't tell the Court we were going to appeal. Your  
22      Honor, we said we might appeal and I want to offer my sincere  
23      apologies to the Court if you were looking for something more.  
24      Certainly no desire on our part to offend the Court.

25           THE COURT: I'm not offended.

1 MR. SCHAFFER: Well, I'm pleased of that Your Honor  
2 and I don't think --

3 THE COURT: I'm disappointed but I'm not offended.

4 MR. SCHAFFER: Your Honor, I made a point of saying  
5 that we might appeal and again, if you were looking for  
6 something more that was my misunderstanding and --

7 THE COURT: Well, the only reason -- the only reason  
8 that I raised the issue, and this is something that's been  
9 coming up from time to time in the Lehman case, and frankly  
10 some of my other cases as well, I'm just going to make this  
11 observation it's unrelated to the specifics of your situation,  
12 but you're in the envelope that's affected by it. Partly  
13 because of the number of contested matters, adversary  
14 proceedings and other disputes that require adjudications from  
15 this Court, not only in the Lehman case but in a variety of  
16 other cases that are currently pending and that are assigned to  
17 me.

18 When a matter is to be appealed, I prefer, to the  
19 extent that parties are able to accommodate me, to be able to  
20 give the district court a coherent statement of my reasoning in  
21 any particular matter. So that in reviewing the bankruptcy  
22 court's decision the district court has more than what may be a  
23 less than coherent transcript or an inaccurate transcript.  
24 Because there are times when I know that certain words that I  
25 use end up in the transcript, not the words I used but

1 something that sounded like a word I used.

2 For that reason, I would like very much to have an  
3 opportunity to get it right, assuming I have the time to do  
4 that. At least get it right as far as I see it. Somebody else  
5 may ultimately say I got it wrong.

6 MR. SCHAFFER: Your Honor-

7 THE COURT: I'm not quite done. So for that reason I  
8 had requested that if there was to be an appeal, and candidly  
9 I'm surprised. You have your right to pursue whatever relief  
10 you think appropriate. I'm surprised, given the argument that  
11 took place in connection with this matter last month, that you  
12 chose to pursue an appeal because it is an instrument for  
13 delay. And we have been involved in a process which has been  
14 designed to expedite proceedings here and to coordinate, to the  
15 extent possible, those proceedings with those related  
16 proceedings that are going on in the High Court in London.

17 I received, yesterday, correspondence from the High  
18 Court in reference to a letter that I had written requesting  
19 cooperation. And I believe that all parties in the Perpetual  
20 litigation received, or were supposed to have received, copies.

21 MR. SCHAFFER: Not yet.

22 THE COURT: And it's a very lovely letter and very  
23 elegantly typed. And I appreciate the fact that the High Court  
24 is paying attention to what's going on in the bankruptcy court  
25 for the Southern District of New York.

1           But my understanding of the timing considerations and  
2           of the procedure is that we still have timing pressure in order  
3           to coordinate this case with the perpetual case in the UK, that  
4           part of that case is on appeal to the appellate court in  
5           England. That part of the case has been retained at the trial  
6           court level relating to indemnity issues. That's about as much  
7           as I know but I am under the distinct impression that the  
8           process you are undertaking on behalf of your client, and I'm  
9           not trying to discourage you in any way from doing what you  
10          think best for your client, could turn out to be a recipe for  
11          delay that will be most detrimental to LBSF if this ends up in  
12          what could turn out to be a prolonged process in the district  
13          court.

14               Now I don't mean to suggest that the district court is  
15          not timely in disposing of bankruptcy appeals because, on  
16          occasion, the district court judge assigned the case may be  
17          quite adept at processing an appeal. But my experience is that  
18          it will take some time, assuming you're granted leave to appeal  
19          at the district court. So I'm a little concerned about your  
20          motives.

21               MR. SCHAFFER: Your Honor, if I may speak to that.  
22          Your Honor, we are not interested in delay. Our goal today is  
23          the same as it was at the initial pre-trial, indeed the same as  
24          it was when LBSF came here asking for leave to file a summary  
25          judgment. We do not want to be in a situation where we're

1 dealing with conflicting orders of court.

2 In terms of the timing of the district court, we've  
3 been checking with the clerk in this court on a daily basis to  
4 find out when it will be transmitted. And our understanding  
5 is, our papers have not yet been transmitted. I don't  
6 understand why but they say they're waiting for a thirty-nine  
7 dollar fee to be paid by Lehman. And I'm hoping to understand  
8 more about that because I can pay that on the way out if it  
9 would expedite things.

10 But let me focus on coordination. All right. I  
11 haven't had the benefit of seeing the chancellor's response to  
12 your letter. I am hoping that the coordination proves to --  
13 proves to do a lot to resolve my issues. But coordination, in  
14 and of itself, is not a silver bullet. Until the English  
15 court, if it's inclined to do so, agrees to accept and to defer  
16 to this court's decision on the issues of bankruptcy law, we  
17 remain at risk of having conflicting orders.

18 And indeed, I think the concern is all the more real  
19 because, well Lehman says the English court is waiting for this  
20 court's decision. Let's remember, the English court said it  
21 would consider requests, it did not say it would defer. When  
22 LBSF asked for a stay of the English proceedings so that it  
23 could proceed here in the first instance, that request for a  
24 stay was denied. Had the High Court agreed to defer to this  
25 court, we wouldn't have a conflict; we wouldn't be concerned at

1 all.

2 The English court did agree, as we understand it, to  
3 give the U.S. court time and space to consider issues under  
4 U.S. law. And of course the issues we raised under Rule 19 and  
5 comity are part of U.S. law. We have no reason to believe that  
6 the English court would disregard this Court's request for more  
7 time or that it would object to letting an appeal proceed if  
8 the district court were so inclined. And indeed the High Court  
9 in England has to wait for the decision of the court of appeals  
10 in England.

11 In some ways, Your Honor, it may be that Lehman  
12 benefits most from an appeal because the High Court granted  
13 Lehman leave to appeal on an expedited basis so that this Court  
14 would have the benefit of the decision on English law after  
15 which it could, and I quote, "determine what sort of requests  
16 it would wish this court," the English court, "to consider".  
17 So I don't think we've got a situation where coordination deals  
18 with all of the concerns.

19 Now, this Court is very much aware that there is  
20 another somewhat similar case involving AFLAC. And if LBSF is  
21 looking for a precedential decision, that might be the decision  
22 and that certainly could be communicated without putting us  
23 into this conflict. It's a conflict that LBSF said, in England  
24 at the beginning of that litigation; they said it would be  
25 wholly wrong for us to be subject, for BNY to be subject, to

1 conflicting orders. And yet here we have them seeking a  
2 decision that would be in direct conflict to what the High  
3 Court decided and that's not coordination.

4 So from our standpoint, requesting leave to appeal is  
5 wholly consistent with the goals of coordination with respect  
6 for both courts and with avoiding conflicting decisions.

7 Your Honor having said that, maybe it would be useful  
8 for me to just address the standards of review and the record  
9 you have before you on this particular motion.

10 Judge Gerber, in the General Motors case, noted that  
11 different cases state the factors applicable to such a motion  
12 differently but we think they're all variations on a theme.  
13 And while the suggestion has been made that we're relying on  
14 the wrong cases, I think that there is substantial overlap in  
15 the factors.

16 The first is, under Judge Gerber's decision, is there  
17 a substantial possibility, although less than a likelihood of  
18 success on the merits? And while LBSF says that we have not  
19 addressed the merits, we did file a substantial brief in  
20 support of our motion for leave. And while they talk a lot  
21 about the standards, we don't think they're really arguing with  
22 the cases, with the issues as we set them forth in that motion.  
23 They wrote a thirty-page brief, I don't believe they view our  
24 request for leave as being frivolous.

25 Now this Court saw the crux of the matter that was

1 raised by our motion as to whether BNY is a fair representative  
2 capable of litigating in Perpetual's absence. And you found  
3 that we were an adequate representative capable of litigating.  
4 But the question we pose on appeal, if it's permitted, is not  
5 whether we're capable of litigating but whether requiring us to  
6 do so would be contrary to Rule 19 or comity. Should we be  
7 compelled to undertake a representation that threatens to  
8 create a prejudice that otherwise wouldn't exist. That's  
9 really the question, should we be compelled to do that? And I  
10 think that Congress and the courts have looked at Rule 19 as a  
11 prime example of an issue where interlocutory review is  
12 appropriate, this sort of due process issue should be taken on  
13 at an early state.

14 Now, is there a substantial possibility of different  
15 opinions here? Well again, we've got extensive briefs on the  
16 motion for leave. I think that, in and of itself, suggests  
17 that there are substantial possibilities.

18 Now Your Honor, you will understand that we  
19 respectfully disagree with your determination that we serve as  
20 a fiduciary, although the Court recognized that we have been  
21 given a right to indemnification in England. We don't have  
22 that indemnification and until we have that, until we have a  
23 satisfactory indemnification in place, it is our position,  
24 looking at the language of the documents, which I won't rehash,  
25 that we have no obligation.

1           One other point I would make with regard to the  
2           citation of the FDIC case in LBSF's papers, we think that's  
3           entirely irrelevant because here we have not been acting on  
4           behalf of Perpetual. We have no duty and indeed we've been  
5           antagonistic to Perpetual.

6           A last point on the merits, we think there is a  
7           substantial possibility that a district court would see a  
8           conflict between this Court's decision and the decision of the  
9           court of appeals in Rappaport. So an immediate review might  
10          materially advance termination because if it turns out that on  
11          appeal we are correct in our reading of Rule 19 on our  
12          invocation of comity, this case goes away.

13          Now LBSF says, this case really is too complicated for  
14          interlocutory review. But this Court said, during oral  
15          argument on the motion to dismiss, "We're not dealing with  
16          discovery or witnesses or evidence. We're dealing purely with  
17          legal issues."

18          We may have novel issues of bankruptcy law here but  
19          those are reasons, if anything, to let threshold procedural  
20          issues, due process issues, go first. We think these can be  
21          addressed quickly and cleanly. But if the district court  
22          thinks it's too complicated, presumably it'll say so, and we  
23          won't be permitted to proceed with an appeal.

24          Irreparable injury. Well, if we are compelled to  
25          defend Perpetual's position without indemnification in place we

1 may be second guess and worse, again, we may face conflicting  
2 judgments, a very real risk.

3 Of course, if LBSF prevails on summary judgment or  
4 after trial, there could be appellate review of these same  
5 issues if the case would go up in its entirety. My concern  
6 then, though, is that a decision on the merits, if LBSF were to  
7 win, would actualize the conflict. Until such time as we might  
8 see a different decision from the appellate court, we would  
9 have the conflict. Again, that assumes that the chancellor is  
10 upheld on appeal in England.

11 I won't spend much time on the irreparable harm to  
12 Perpetual; I think the Court understands that. Let me,  
13 instead, talk about whether there is any prejudice to a stay  
14 from Lehman's perspective. The assets aren't going anywhere.  
15 The AFLAC case is not going to be stayed. There is a chance  
16 for LBSF to seek its precedential decision there.

17 Now, why do we need a stay if we're going to be here  
18 anyway briefing issues in the AFLAC case? Well, it's to  
19 prevent conflicting judgments in the perpetual case. AFLAC  
20 doesn't present that risk and, Your Honor, during the argument  
21 on the motion to dismiss you had a colloquy with Mr. Miller  
22 where you said -- you observed that AFLAC's different. There  
23 the holder is in court. We have direction and indemnification,  
24 we only have one court.

25 Again, there's no reason to think the English court

1 would not wait. And again, it can't act now because Lehman has  
2 filed an appeal of the chancellor's decision.

3 Your Honor, last of the factors here is the public  
4 interest. The Supreme Court has noted that there is a  
5 substantial public interest in Rule 19 issues. It's important  
6 to know that you have the right parties and to have effective  
7 disposition of threshold due process issues. We think that a  
8 stay promotes an orderly process and voids what might be this  
9 Court inappropriately reaching the merits.

10 If the district court grants the motion for leave,  
11 presumably it sees the real issue, in which case public  
12 interest favors having the benefit of the district court's  
13 thinking.

14 Your Honor, again, I'm not looking to reargue the  
15 motion to dismiss so let me just conclude by saying you  
16 recognize there might be an interlocutory appeal for the  
17 reasons we've set forth in our papers, in our argument. We  
18 believe it warrants a stay pending the district court's  
19 determination on our motion for leave.

20 THE COURT: All right. Thank you.

21 MR. MILLER: Good afternoon, Your Honor. Ralph Miller  
22 from Weil, Gotshal & Manges here on behalf of Lehman Brothers  
23 Special Financing, Inc., known as LBSF.

24 This motion for stay should be denied because movant  
25 BNY can't show any of the four elements that are required in

1 the Second Circuit for the extraordinary remedy of a stay while  
2 a motion for leave to file an interlocutory appeal is pending.

3 I can be brief because the Court has already  
4 highlighted some of the key points and because I think our  
5 opposition made some things clear. But I do want to clarify  
6 some confusion that may have been generated in the argument  
7 that we just heard.

8 First of all, if I might approach the Court with a  
9 couple of case copies?

10 THE COURT: Sure.

11 (Pause)

12 MR. MILLER: Your Honor, the three cases I passed out  
13 are the General Motors case that was just cited, recently  
14 decided by Judge Gerber. A case that was cited in our  
15 opposition papers from the appellate panel, and I'm not sure  
16 how to pronounce it but I call it Bijon Serrif (ph.) and then  
17 finally a case that was not cited in the briefs but seemed to  
18 be implicated by some of the argument we had just now, which is  
19 a Fourth Circuit decision in a case called the Rockel (ph.)  
20 case. And it deals with the right to appeal Rule 19 rulings.

21 If we -- the first thing that was interesting was that  
22 Mr. Schaffer changed the order of the factors listed by Judge  
23 Gerber in General Motors. He said the first factor listed, and  
24 these are listed on page 6 and highlighted, I believe Your  
25 Honor, in this copy. He said the first factor listed was the

1 substantial possibility of success. Actually, the first factor  
2 listed was the irreparable injury factor, which is also the  
3 first factor listed in the last page of the Bijon Serrif  
4 opinion. And these are essentially the same four factors that  
5 need to be used. These are different from the factors that  
6 were listed in the motion that was filed by BNY. And we  
7 pointed out in our opposition that these are the correct  
8 factors.

9 The irreparable harm factor by itself actually  
10 determines this question, I think, because the normal reason  
11 for an interlocutory appeal is that there's going to be some  
12 reason that the normal appellate process does not deal with the  
13 issue. And as Mr. Schaffer pointed out, the money is under the  
14 control of BNY. So we don't have a situation where some other  
15 party, outside of BNY's control, is going to do something with  
16 the race of the case, so to speak, with the factors.

17 The other critical point, Your Honor, and this is why  
18 I passed out Rockel case, is that courts recognize that Rule 19  
19 is an interlocutory issue that can be brought up after final  
20 judgment. If you turn to page 3 of that opinion, it says that  
21 should the GW II defendants, suffer an adverse ruling on the  
22 merits we could review the Rule 19 issue in an appeal from that  
23 judgment.

24 So the idea that there's going to be a summary  
25 judgment that is going to become binding and they're not going

1 to have a right to raise Rule 19 in the normal fashion simply  
2 doesn't apply here. There is absolutely no possibility of an  
3 irreparable harm showing. What he said, and I wrote it down,  
4 was that this could actualize the conflict. I don't know what  
5 that means but the point is that a summary judgment ruling  
6 would actually focus the issues for coordination. I have to  
7 admit it's possible it would eliminate them if the Court ruled  
8 against LBSF. If the Court ruled for LBSF and clarified U.S.  
9 bankruptcy law, that would greatly aid coordination.

10 We believe -- so the first factor, which was listed  
11 and is listed first in most of the cases, really dooms this  
12 motion. And I might note, Your Honor, that the cases recognize  
13 that there has to be a showing on all four of these factors.  
14 There's some difference in the language about whether it's a  
15 balancing test or every factor has to be shown. But clearly  
16 the irreparable harm factor is critical.

17 With regard to the substantial possibility of success,  
18 that has to be shown twice here. It has to be shown first on  
19 leave to appeal and then it has to be shown on the merits of  
20 the appeal. I'm not going to spend any time on the merits, the  
21 Court; I think has already provided a very compelling  
22 explanation on the merits. On the issue of leave to appeal,  
23 the standard in this circuit is that there has to be a  
24 controlling issue of law on which there is a likelihood of  
25 disagreement.

1           And here, Your Honor, we don't believe that there is a  
2     controlling issue of law. There is a question of how the law  
3     should be applied to the facts in this record but the case law  
4     is pretty clear that an interlocutory appeal is not appropriate  
5     if the Court has to go into the record on appeal to try to find  
6     out if the district court or the bankruptcy court correctly  
7     applied the law to the record. And here this record includes  
8     not only this proceeding but understanding the AFLAC case and  
9     understanding the Perpetual case. And we don't believe that  
10    this is a case that meets any of the elements, frankly, for  
11    leave to grant an interlocutory appeal. So we think they have  
12    not made a showing on the element of a substantial possibility  
13    of the leave to appeal. And then even if they got the leave to  
14    appeal, there's no showing of a substantial possibility that  
15    the appeal will be meritorious.

16           The third element the Court has already touched on and  
17    that is the injury to other parties. And if the stay is  
18    granted, it is quite certain that one set or the other of  
19    parties besides BNY will be injured. As the Court points out,  
20    whether it was the intent of BNY or not if the stay is granted  
21    it would delay the resolution of these bankruptcy issues in  
22    this group of cases, at least in this case, in a way that could  
23    go back to the London court and that could be used to allow the  
24    coordination process.

25           That has the real possibility that the London court,

1       which as Mr. Schaffer points out has not promised to stay and  
2       has not promised to defer, it simply allowed some time, may  
3       determine, and we understand that court operates under some  
4       mandates of expedited processing that it must rule. And if it  
5       does rule then it's possible that LBSF will lose its right to  
6       have these bankruptcy issues decided before an order is entered  
7       which could direct BNY to comply. And at that point there is  
8       irreparable harm. Once this money is paid out, ever getting it  
9       back becomes very problematic and maybe impossible. So LBSF  
10      actually faces a risk of irreparable harm from the delay that  
11      this could produce.

12             If the English court should defer and there is a delay  
13      then Perpetual and Belmont, which have been urging that court  
14      to act promptly will suffer a delay. So either way the delay  
15      is going to injure somebody other than BNY. And BNY, as it  
16      keeps pointing out, it says more or less a stakeholder; it's in  
17      the middle here. So it's not actually being hurt as long as  
18      it's not asked to pay the money twice, which I don't think  
19      anybody has ever suggested as a realistic risk.

20             The final factor has to do with public interest and I  
21      think it merges, to some extent, with the interest of the other  
22      parties. But in this particular case coordination and comity  
23      is in the public interest. And the issues that are being  
24      presented in this case are of importance to litigants not only  
25      in this matter but in a number of other matters pending, not

1 pending but matters that are in dispute around the globe. And  
2 delay in having the U.S. bankruptcy issues resolved so that  
3 that resolution will be before the English court and it can  
4 take them into account could affect many, many other parties.  
5 So the public interest is not benefitted by the delay that is  
6 inherent in this kind of stay.

7 So for all these reasons, Your Honor, we believe that  
8 BNY has not shown any of the elements and it certainly has not  
9 made the necessary showing either under a balancing approach or  
10 under the requirement. It must show all of the elements and  
11 the motion for stay should be denied.

12 I'd be happy to answer any questions, Your Honor.

13 THE COURT: I don't have any questions. Mr. Schaffer,  
14 do you have anything more?

15 MR. SCHAFFER: Your Honor, I think I covered  
16 everything in my initial remarks.

17 THE COURT: Okay. Based upon, not only this argument  
18 but my familiarity with the issues, that were debated  
19 extensively on the record last month in connection with the  
20 Rule 19 issues and the BNY motion to dismiss I find no basis to  
21 stay proceedings, at least at this juncture.

22 I also think that it's difficult for me to even apply  
23 the factors outlined by Judge Gerber in the General Motors  
24 decision in this setting, in as much as the record on the  
25 motion for leave to appeal hasn't even left the building. The

1 option remains that a district court judge may, upon review of  
2 the papers submitted on the merits of that motion for leave to  
3 appeal, find merit in BNY's position. I don't want anything  
4 that I say now to indicate, one way or the other, how the  
5 district court should rule to the extent that the transcript of  
6 these remarks end up before that judge.

7 But based upon my familiarity with the underlying  
8 dispute here and in fact counsel's admitted involvement in the  
9 AFLAC case, which involves virtually identical issues that will  
10 be presented to this Court on BNY's behalf, it is difficult for  
11 me to fathom how the issues presented in the Perpetual case  
12 rise to the level of importance assigned to them by BNY's  
13 counsel.

14 This is really all about BNY's efforts to protect  
15 itself. No more, no less. And doing everything within reason  
16 to make sure that conflicting results in the U.K. and in the  
17 United States do not expose BNY to an impossible dilemma. I  
18 recognize that but that highly contingent and potential future  
19 risk does not constitute cause to stay these proceedings now.  
20 The motion is denied.

21 Is there more?

22 (Pause)

23 MR. MILLER: Your Honor, Ralph Miller again. I am  
24 advised that this completes the agenda for the debtors in the  
25 Lehman Chapter 11 proceedings. I don't know if there's

1 anything else on the agenda for other parties.

2 THE COURT: Well let me just supplement some remarks I  
3 just made. I want it to be clear that my ruling in connection  
4 with BNY Corporate Trust Services' request for a stay is  
5 predicated upon not only the remarks I made but upon the  
6 comments that Mr. Miller made referencing Judge Gerber's  
7 decision and the four factors that are the standard factors for  
8 granting or denying a stay pending appeal. And I'm satisfied  
9 that those standards are not satisfied.

10 I believe that there is a recognition hearing in the  
11 Lehman Re Chapter 15 case, which is scheduled to commence  
12 immediately at the conclusion of this afternoon's omnibus  
13 hearing. We'll take a ten minute break and start with Lehman  
14 Re. We're adjourned for ten minutes.

15 MR. SCHAFFER: Thank you, Your Honor.

16 MR. MILLER: Thank you, Your Honor.

17 (Proceedings concluded at 3:14 PM)  
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## I N D E X

## R U L I N G S

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23	appeal the August 12, 2009 order denying		
24	BNY's motion to dismiss and any disposition		
25	of the merits of that appeal denied		

## C E R T I F I C A T I O N

I, Clara Rubin, certify that the foregoing transcript is a true  
and accurate record of the proceedings.

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Clara Rubin

AAERT Certified Electronic Transcriber (CET\*\*D-491)

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